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DETERMINED BY THE
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OF
MAINE.

By JOSEPH WHITMAN SPAULDING,
REPORTER OF DECISIONS.

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VOLUME LXXVIII.

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CASES
IN THE
SUPREME JUDICIAL COURT,
OF THE
STATE OF MAINE.

HENRY W. PERKINS *vs.* OLIVER B. MORSE.

Franklin. Opinion December 16, 1885.

Married woman. Lease. R. S., c. 61, § 1.

The statutory enactment, that a wife cannot, without the joinder of her husband, convey real estate conveyed to her by him, or paid for by him, or given or devised to her by his relatives, does not prevent her legally leasing the premises in her name alone for a term of years.

ON REPORT.

Forcible entry and detainer originally brought in the municipal court of Farmington. The facts are stated in the opinion.

H. L. Whitcomb, for the plaintiff.

J. C. Holman, for the defendant.

If the defendant's wife could have leased the premises for two years she could for ninety-nine years. The lease was a conveyance — a deed. I rely upon the case of *Call v. Perkins*, 65 Maine, 439; *Reed v. Reed*, 71 Maine, 156; R. S., c. 61, § 1. That the

lease was a conveyance I refer to the definitions of the same in 2 Bouvier's Law Dict. 17, 18, 19. See also, Webster's Dict. "Lease."

PETERS, C. J. Real estate directly or indirectly conveyed to a married woman by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband; except real estate conveyed to her as security or in payment of a *bona fide* debt actually due to her from her husband. R. S., c. 61 § 1.

In the case before us it appears that a farm, with buildings thereon, was purchased in the name of a wife and paid for fully by her husband. They afterwards separated, now living apart. After the separation, he remaining upon the place, she let it under a sealed lease, in usual form, for two years, on a rent payable annually, to the complainant, who seeks to remove the husband from the possession. The only question presented by the case, is, whether the lease is a conveyance within the meaning of the statute above quoted. It is the opinion of the court that it is not. There is much to sustain such a conclusion.

The word convey or conveyance must refer to an alienation of the estate—a transference of the title. It is "real estate" that cannot be conveyed. A lease is personal property. It bargains away a temporary possession,—does not dispose of any fee or title. There is no inhibition against a sale of personal property by the wife alone, although given to her by the husband.

Real estate "conveyed to" a married woman is the property described; "cannot be conveyed by her" are the words to be interpreted. A lease may be in a sense a conveyance, but such is not the commonly accepted nor the accurate meaning of the term. When we say premises are leased we generally mean that the use of them is transferred; and by the term conveyed that the title is deeded. It is a significant fact that the word convey is many times used in the revised statutes, and especially in chapter seventy-three relating to conveyances, and generally, if not at all times, in the sense of an alienation of the title to real estate. The distinction is clearly observed in section eight, which pro-

vides that "no conveyance of an estate, &c. or lease for more than seven years" shall be effectual against third persons unless the deed be recorded.

If the legislature intended that the wife should not lease property acquired by her through her husband, it would have been easy to declare its intention in explicit terms. It is hardly to be supposed that it was left to be implied. A married woman is not limited in the management of her property, however obtained by her. She may control its income, unless she releases it to her husband. How can she manage this property or control its income, when not occupying it, unless she can rent it? The counsel for the defendant argues that if the wife could lease at all, she can lease the farm for ninety-nine years; a lease practically equivalent to a conveyance of title. This argument is quite plausible, but not in our judgment sound. If the wife cannot make a lease for two years, it must be because she cannot lease at all. If the lease is for ninety-nine years, a rent will be presumed to be reserved. It would be different from an absolute conveyance which might result in a waste or loss of the property. If the statute needs amendment the legislature can amend it. We construe it as it stands.

An appeal to the authorities sustains the view advocated by the complainant. Jacob's Law Dictionary gives this as the old common-law definition of the word which is the key to the dispute: "Conveyance is a deed which passes land from one man to another." In *Abendroth v. Greenwich*, 29 Conn. 356, a party was to convey a bridge to a town. The court said: "To convey real estate, is, by an appropriate instrument, to transfer the legal title to it from the present owner to another." In *Mayor v. Mabie*, 13 N. Y. 151, a question arose as to the meaning of the word conveyance in a statute which provides that "no covenants shall be implied in any conveyance of real estate;" and it was held that a grant of wharfage for one year was not a conveyance of real estate. In *Tone v. Brace*, 11 Paige, 566, it was decided that a lease for a term of years was not, in the ordinary sense of the term, a conveyance of land. In the case of *In re Hunter*, 1 Edw. Ch. 1, it was decided that, where a person was to convey

an estate, he must transfer "the whole title." *Mott v. Bucknam*, 3 Blatch. 71, decides that a charter-party is not a conveyance of a vessel, — that it goes to the use and not the title. In *Livermore v. Bagley*, 3 Mass. 487, it was determined, upon a very learned discussion of the question by both bar and court, that the word conveyance in the bankrupt law of 1800 referred to a deed of land, and not to a bill of sale of personal property.

We think the statutory provision under review, should not be very generously interpreted for the husband, when the interests of third persons are likely to be imperilled thereby. The statute is very broad, and in many instances has been a stumbling-block in the way of innocent purchasers. The expediency of the statute is doubted by many. It adds one more opportunity for a defect in titles which the public records cannot disclose. With what safety or certainty can a purchaser ascertain whether an intervening grantor was a married woman when she obtained the estate; or whether the estate was paid for by her husband or herself; or who the husband's "relatives" are or were; and whether any of them gave her the property? Complete protection is attained only by taking no real property from any married woman without the joinder of her husband; and this rule of caution would operate harshly against married women who may wish to sell property held strictly in their own right.

Defendant defaulted.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

STATE OF MAINE vs. WILLIAM A. GERRISH.

York. Opinion December 16, 1885.

Practice. Larceny. Receiving stolen goods. Indictment. Value of property stolen.

On a motion in arrest of judgment, the court cannot consider matters which arise outside of the indictment and cannot be seen on the indictment itself. An indictment for concealing stolen goods is not void because the articles are described therein collectively instead of separately; it may be on that account more difficult to maintain.

Such an indictment may not entitle the state to a verdict, if the proof fails to show guilt as to any portion of the goods; but a general verdict against the accused implies conclusively that the proof was complete.

In larceny or concealment of stolen goods, it must affirmatively appear that the goods stolen or concealed were of some value; but the proof of that fact may be inferential merely; and the jury may infer it from an inspection of the goods or from a description of them by witnesses.

ON EXCEPTIONS.

After verdict the defendant moved in arrest of judgment. The only question discussed in the opinion relates to the exceptions to the ruling of the court in overruling the motion in arrest of judgment, which was as follows:

"And now after verdict and before judgment in the above entitled cause, the defendant comes and moves that judgment in said cause be arrested and that he be discharged and allowed to go without day, for the following reasons, because:

"1. The indictment in said cause charges no offence.

"2. Because the crime alleged in said indictment is not set forth and alleged with sufficient certainty.

"3. Because the articles alleged in said indictment to have been feloniously stolen, taken and carried away, and that said indictment alleges that said defendant feloniously did buy, receive and aid in concealing, the said William A. Gerrish then and there well knowing the said property, goods and chattels then and there to have been feloniously taken and carried away, is not in said indictment alleged and set forth and described with sufficient accuracy.

"4. Because the said indictment alleges the value of the goods and chattels collectively, and there is no evidence that all the goods and chattels therein alleged that said defendant did feloniously buy, receive, have and aid in concealing, was bought, received, concealed, or assisted in being concealed, by this defendant.

"5. Because the state, in the trial of said cause, proved no value to the goods and chattels in said indictment mentioned.

"6. And that said indictment is in other respects informal and insufficient."

Frank M. Higgins, county attorney, for the state, cited: 2 Bish. Cr. Procd. (3d ed.) § § 713, 985, 751; Roscoe's Cr. Ev. (8th ed.) § 126; 3 Greenl. Ev. (Redfield ed.) § 153; Wharton Cr. Ev. (8th ed.) § § 128, 126; *Com. v. Morrill*, 62 Mass. (8 Cush.) 574; *Com. v. McKenney*, 75 Mass. (9 Gray,) 114; *Com. v. Lawless*, 103 Mass. 425; *State v. Buck*, 46 Maine, 531; *Remsen v. People*, 57 Barb. (N. Y.) 324; *Com. v. Hogan*, 3 Brewster, (Penn.) 341; *Com. v. Burke*, 94 Mass. (12 Allen,) 182; *Com. v. Riggs*, 80 Mass. (14 Gray,) 378.

Copeland and Edyerly, for the defendant.

The indictment must state the value of the articles stolen. *Commonwealth v. Smith*, 1 Mass. 245.

Every material allegation in an indictment must be proved as alleged, and it was incumbent on the state to show that the goods alleged to have been stolen, were of value. *Hope v. Commonwealth*, 9 Met. 136; *Locke v. State*, 32 N. H. 106.

It is consistent with the allegation in the indictment, that the only goods which were deemed by the grand jury to be of any value, were those which were not produced at the trial, or proved to have been stolen or concealed. As the defendant may have been convicted without being found guilty of concealing anything which the grand jury and the traverse jury concurred in finding to be of any value, the verdict should be set aside. *Commonwealth v. Lavery*, 101 Mass. 209; *O'Connell v. Commonwealth*, 7 Met. 460; *Hope v. Commonwealth*, 9 Met. 134.

PETERS, C. J. The indictment charges the concealing of stolen goods, described in this manner: "One box containing about twenty pounds of tobacco, one chest of tea, thirty pairs of shoes and ten pairs of boots, all of great value, to wit, of the value of seventy-five dollars."

Several matters are presented under the motion in arrest which we cannot consider, because they arise outside of the indictment. The only point presented under the motion that may be seen upon the indictment itself, is that the goods are collectively instead of separately valued. But this does not render the indictment void. It may have made it difficult to

maintain. The point relied on by the defense is that, inasmuch as all the alleged goods were not stolen and concealed, the entire value of the property may have attached to the goods which were not stolen, the others being valueless. But the indictment itself discloses no such weakness. The presumption arising from a general and unqualified verdict, is, that all the goods were stolen and secreted. The verdict saves the indictment, rendering the whole record good. *State v. Hood*, 51 Maine, 363; *Commonwealth v. Lavery*, 101 Mass. 207; 2 Bish. Proc. (3d ed.) § 714.

The counsel for the respondent asserts that, as a matter of fact, all the articles were not stolen, and produces a copy of the evidence for our examination, that we may see that they were not. But that is a matter of proof and not of pleading. To meet any defect of proof the remedy would have been to request rulings appropriate to the facts, if not given without request. Or a motion to set the verdict aside as being against the proof would have reached the alleged difficulty. The point is presented to us only upon exceptions to a refusal to sustain a motion in arrest.

In the bill of exceptions a point is made upon the ruling of the judge in another question. It is inferable from the exceptions that there was no evidence introduced to show what the goods or any of them were worth, or whether worth anything or not; that is, no witness testified specifically upon the question of value. The judge was requested to tell the jury that the prosecution must prove that the articles named in the indictment were of value, and that the fact should be proved by evidence and was not to be merely inferred. The jury were instructed that the fact of value must be proved by evidence, but that they might infer from all of the evidence in the case whether the articles were of some value or not. This was correct.

It was not required that the fact of value should be established by any separate proof. The jury may infer it from an inspection of the articles or from having heard them described by witnesses. The jury need not necessarily be informed of what they can see

for themselves. Many things speak their own value. *Res ipsa loquitur*. Suppose the stolen goods had been government gold pieces; would it have occurred to any one that a witness should be called to swear that they were valuable? Bish. Cr. Proc. § 751, and cases; *Com. v. Burke*, 12 Allen, 182; *Com. v. McKenney*, 9 Gray, 114; *Com. v. Lawless*, 103 Mass. 431.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

ORRIN MCFADDEN, Judge of Probate,

vs.

J. H. H. HEWETT, Administrator.

Lincoln. Opinion December 16, 1885.

Pleadings. Declaration. Amendment. Guardian's bond. R. S., c. 72, § 10.

A declaration on a guardian's bond, which omits the averment, that the interest of the persons suing had been specifically ascertained by probate decree, may be amended by adding the omitted words.

The declaration is not faulty for alleging that the action had been authorized by the judge of probate, when it is immaterial whether he assented to the action or not; the over-averment may be disregarded or stricken out.

A guardian's bond is not converted from a statutory to a common law bond merely because it contains provisions not required in the statutory form, which are in accordance with law.

ON EXCEPTIONS.

An action against the surety, Beder Fales, on a guardian's bond for sale of real estate. The original defendant died during the pendency of the action and his administrator, the present defendant, was cited into court.

The defendant demurred to the declaration and the demurrer was sustained, and the plaintiff was allowed to amend upon terms. The defendant again filed a demurrer which was overruled and he alleged exceptions to the ruling of the court in allowing the amendment and in overruling the second demurrer.

(Declaration.)

"For that the said Beder Fales, together with one Joshua Patterson and one James Jones, then in full life, but since deceased, on the twenty-sixth day of August, A. D. 1856, at Thomaston, to wit: at Wiscasset in the county of Lincoln, by their writing obligatory of that date, sealed with their seals, and here in court to be produced, bound and acknowledged themselves to be indebted to one Arnold Blaney, judge of probate of wills and for the granting of administrations within said county of Lincoln, in the sum of nine hundred dollars, to be paid to the said Blaney or his successor in said office on demand; and the plaintiff avers that he, the said Kennedy, is the successor of said Blaney, in the said office of judge of probate for said county of Lincoln, and that this writ is sued out in the name of the said Kennedy, judge of probate as aforesaid, by William O. Counce, Alden M. Counce, and Mary P. Counce, all of Warren, in the county of Knox, and Eliza A. Jordan of Thomaston, in said county, children and heirs of Oliver W. Counce, late of said Warren, whose guardian the said Joshua Patterson was at the time of the execution of said bond, and for whose benefit said bond was given; all of whom are personally interested in the bond herein declared upon.

"Yet though often requested, the said defendant has not paid the said sum, but neglects and refuses so to do."

(Amendment.)

"The plaintiff in the above entitled action prays leave to amend the declaration in his writ, by adding thereto the following, viz: And that their interests in said bond have been specifically ascertained by a decree of the judge of probate for said county of Lincoln; and that they have been expressly authorized by such judge to commence this suit upon said bond for their benefit, and for the benefit of said estate; yet though often thereto requested, the said Fales, Patterson and Jones, or either of them in the lifetime of the said Patterson, or the said Fales and Jones or either of them in the lifetime of the said Jones, or the said Fales after the decease of said Patterson and said Jones, never paid the said sum of nine hundred dollars to

the said Arnold Blaney while in said office, or to any of his successors therein, or to the said Almore Kennedy; but they and each of them have neglected and still neglect to do so."

(Condition of the bond.)

"The condition of this obligation is such that whereas, the above bounden Joshua Patterson, guardian of Eliza A., Wm. O., Alden M. and Mary P. Counce, minors and heirs of Oliver W. Counce, at a probate court, holden at Thomaston, within and for said county of Lincoln, on the 26th day of August, 1856 last, obtained license to make sale of certain real estate as is described in his petition on file, dated August 1, 1856.

"Now therefore, if the said Joshua Patterson shall in all things relating to such sale, govern himself by the laws of said state, so that the interest of said minors shall be secured, and shall observe the rules and directions of the laws for the sale of real estate by executors or administrators; and shall put out and secure the proceeds of said sale on interest, for the benefit of said minors, and shall account for and make payment of the proceeds of said sale agreeably to the rules of law; then the above written obligation to be void, otherwise to abide in full force and virtue."

A. P. Gould, for the plaintiff, cited: *Gould's Pl. c. 3, § 8*; *Jones v. Sutherland*, 73 Maine, 157; *Blake v. Maine Central R. R. Co.* 70 Maine, 60; *Briggs v. Grand Trunk Ry. Co.* 54 Maine, 375; 1 Chitty Pl. 228; *Cleaves v. Dockray*, 67 Maine, 118.

Baker, Baker and Cornish, for the defendant.

The plaintiff's amendment should not have been allowed even on terms. Under rule IV of the court an amendment in form is allowable, and under rule V an amendment in matter of substance may be made in the discretion of the court, but no amendment will be allowed unless it be consistent with the original declaration and for the same cause of action. The amendment here comes within the prohibition and should not have been allowed. *Annis v. Gilmore*, 47 Maine, 152; *Parkman v. Nutting*, 59 Maine, 398; *Milliken v. Whitehouse*, 49

Maine, 527; *Cooper v. Waldron*, 50 Maine, 80; *Farmer v. Portland*, 63 Maine, 46; *Bruce v. Soule*, 69 Maine, 562; *Groton v. Tallman*, 27 Maine, 68.

Counsel contended that the declaration after the amendment was bad, and cited: *Wing v. Rowe*, 69 Maine, 282; *Robbins v. Hayward*, 16 Mass. 524; *Coffin v. Jones*, 5 Pick. 61; *Barton v. White*, 21 Pick. 58; *Groton v. Tallman*, 27 Maine, 68.

The bond in suit is not a statute bond and therefore not properly brought here. This bond was given in 1856 and the statute form then required, is stated by R. S., 1841, c. 112, § 5.

The conditions of the bond in suit required of the guardian more than the statute form. The conditions should follow the words of the statute, precisely. See *Lyman v. Conkey*, 1 Met. 317; *Fay v. Taylor*, 11 Met. 529; *Brooks v. Brooks*, 11 Cush. 18; *Morse v. Hodsdon*, 5 Mass. 314; *Boston v. Capen*, 7 Cush. 116; *Com. v. Kelly*, 9 Gray, 259; *Bank of Brighton v. Smith*, 5 Allen, 413; *Athens v. Ware*, 39 Maine, 345.

PETERS, C. J. This action, on a guardian's bond, was designed to be brought under section 10, ch. 72, R. S. But it was not originally averred in the writ that the interest of the persons suing the bond, had been specifically ascertained by a decree of the judge of probate, as required by that section. The plaintiffs were allowed, upon terms, to amend by inserting the omitted words. The defendant contends that the amendment was not admissible,—that it introduces a new cause of action and in a sense new parties. We think the amendment merely allows a missing link to be supplied in the facts alleged, and that the objection to it should not be sustained.

The plaintiffs, before amendment having too slender an averment, after amendment have too much. In the flurry of *nisi prius* the amendment was over-loaded. It not only added the missing words, but further added an averment that the plaintiffs (in interest) had been expressly authorized by the judge of probate to commence the action for their benefit, and for the benefit of the estate. These superfluous words were borrowed

from section 16, of the chapter referred to, and would be more appropriate to an action brought under conditions not applying to this case. But the words are harmless and may be rejected as surplusage. Under section 10 the action is instituted without the consent of the judge, and under section 16 with his consent. It must be harmless to allege the judge's consent when it matters not whether he consents or not. "The estate" can be no other than the estate belonging to the heirs, and the action really enures to the benefit of the heirs and their estate, although instituted under section 10 and not section 16.

An additional defense is that the bond declared upon is not a statute bond — that it contains provisions not required by law. The provision in the bond which seems to be the most of a departure from the statutory form, is the requirement that the guardian should put out and secure the proceeds of sale (of the real estate) on interest for the benefit of the minors. But this imposed no new obligation. We think the position taken by plaintiff's counsel correctly answers this objection. While the statutory form of bond did not require such a thing, the law did require it. The bond was given when part 6 of section 10, ch. 112, R. S., of 1841, was in force. The later form of bond requires the principal to obey the law appertaining to the duties undertaken by him. The older form, and this bond was of a style formerly used, contained more specification of such duties. The other obligations named in the bond were substantially what the law imposed. The opinion, in the case of *Cleaves v. Dockray*, 67 Maine, 118, contains illustrations of harmless departures from the strict formalities of probate bonds, and the present case falls within the principle there illustrated. The law required certain duties of the guardian who gave the bond now in suit — and his bond required no more. No new or additional burden was put upon him.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

THOMAS H. WELLMAN vs. JOHN DICKEY.

Waldo. Opinion December 19, 1885.

Deeds. Highway surveyors. Shade trees. Trespass. Damages.

A deed containing the words "Excepting the roads laid out over said land," conveys the fee within the limits of the road, subject to the easement of the public incident to the uses of the way.

Highway surveyors may lawfully dig outside the limits of the road for materials suited for the making or repair of ways, only upon land that is unenclosed and uncultivated.

The owner of land upon a public way may lawfully plant ornamental or shade trees within the limits of the way, if the public use is not thereby obstructed or endangered.

Trees so planted are a public benefit, and can not be destroyed without the call of public necessity.

Highway surveyors, who destroy such trees without reason or necessity, are trespassers, and if the act is wanton, they are liable for exemplary damages.

ON EXCEPTIONS.

The case is stated in the opinion.

William H. Fogler, for the plaintiff, cited: *Moore v. Moore*, 21 Maine, 354; *Hunt v. Rich*, 38 Maine, 195; *Look v. Norton*, 55 Maine, 103; R. S., c. 18, § 95; *Whittier v. McIntyre*, 59 Maine, 144; *Stetson v. Bangor*, 73 Maine, 359; *Cutter v. Cambridge*, 6 Allen, 20; *Winslow v. Nayson*, 113 Mass. 411.

Knowlton and Knowlton, for the defendant, cited: *Little v. Palister*, 3 Maine, 6; *Starr v. Jackson*, 11 Mass. 519; R. S., c. 18, §§ 76, 50; *Cyr v. Dufour*, 68 Maine, 492.

The grantors in the plaintiff's deed did not convey the land where the road was laid out twenty years before the date of the deed. The general boundaries are given conveying the whole tract "except" a part of said premises. That excepted part was not conveyed. The plaintiff has no title to the excepted land. *Inhabitants of Winthrop v. Fairbanks*, 41 Maine, 307; *Bassy v. Grant*, 20 Maine, 281; *Winthrop v. Fairbanks*, 41 Maine, 307; *State v. Wilson*, 42 Maine, 9; *Brown v. Allen*, 43 Maine, 590.

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85	281
78	29
88	156
78	29
89	261
78	29
91	473

HASKELL, J. Trespass *q. c.* for the cutting down of twenty ornamental trees. The defendant attempts to justify by the lawful performance of duty as highway surveyor.

The plaintiff, in 1859, entered into possession of a lot of land, lying "southwardly" of a highway, under an agreement to purchase, and hitherto has held possession thereof, and received a deed of the same, October 14, 1863. He planted and nurtured a row of shade trees across his land, along the highway. The jury found that some of the trees stood without the limits of the highway, and assessed damages.

The words of grant in the plaintiff's deed conveyed the land to the centre of the highway; but following the description, it contained the words, "excepting the roads laid out over said land." To the instruction, that the deed conveyed the locus to the centre of the road, the defendant has exception.

Such construction should be given to a deed, that each part, phrase and word, may have force and effect, that the intention of the parties, if by law it may, shall prevail; and exceptions from the grant must be construed, in cases of doubt, most strongly against the grantor. *Worthington et al. ex'rs. v. Hylyer et als.* 4 Mass. 196; *Wyman v. Farrar*, 35 Maine, 64.

The intention of the parties to this deed undoubtedly was, that the plaintiff should take the title to the center of the way, but that the easement of the public, incident to the uses of a public way, should be excepted from the grant, otherwise the locus would naturally have been bounded by the line of the road. Moreover, the exception in terms is of something laid out *over* the land, not of the land itself. This construction has been repeatedly adjudged. *Rhun' et als. v. Farnsworth*, 69 Maine, 404; *Tuttle v. Walker*, 46 Maine, 280; *Moulton v. Trafton*, 64 Maine, 218; *Leavitt v. Towle*, 8 N. H. 96; *Richardson v. Palmer*, 38 N. H. 212; *Jamaica Pond Acqueduct Corporation v. Chandler et als.* 9 Allen, 159.

The presiding justice instructed the jury, that, if the defendant dug outside the limits of the road upon the locus, where "it was cultivated for the crop of grass only, with trees planted upon it," he would not be protected by R. S., c. 18, sec. 65. To this instruction the defendant has exception.

That statute authorizes the surveyor to dig for materials, suited for the making, or repair of ways, in land not inclosed, or planted, and if the same are taken from land without the limits of the way, then at the charge of the town. The statute contemplates, that only unenclosed and uncultivated land shall be subjected to the will of the surveyor in such behalf. If the land is seeded, or in any way prepared and used for tillage, or for the production of crops, or trees, useful or ornamental, the surveyor must not dig upon it; such land is "planted," that is, subjected to the uses of husbandry, reclaimed from a state of nature, so that it has become "tillage or mowing land," the same as "corn or meadow." *Barrows v. McDermott*, 73 Maine, 441.

The presiding justice instructed the jury, that, if from all the circumstances surrounding the case, the action of the surveyor, in removing the trees planted within the limits of the road, "was reasonable, and not corrupt, or oppressive," he would not be liable in trespass for the act. To this instruction the defendant has exception.

Public officers should act faithfully, discreetly and prudently, with honest purpose, and without corrupt motive; when they act unreasonably, indiscreetly and without honest purpose, and with intent to oppress and injure, they do not have the protection of law; they are violators of it, and become amenable to its salutary provisions that afford redress to the injured party.

The plaintiff had planted a row of shade trees along the line of the road, some within and others without the road limits. This he had a lawful right to do, if the public use is not thereby obstructed or endangered. The statute R. S., c. 3, sec. 59, VI, encouraged this method of beautifying and adorning public thoroughfares. Trees so planted are a public benefit and ought to receive public approval, if not official care. They cannot be lawfully destroyed without the call of public necessity, R. S., c. 127, sec. 9. Highway surveyors should protect and guard them, and not wantonly uproot and destroy them, without reason, or necessity, as the jury found was done in this case, which is clearly of that class wherein exemplary damages may be awarded,

if the jury are of the opinion that such salutary relief ought to be given. The remaining exceptions are immaterial.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

HOWLAND W. MAXWELL vs. DANIEL ALLEN.

Androscoggin. Opinion December 21, 1886.

Contract. Liquidated damages. Partnership.

One partner agreed in writing to sell to a co-partner his interest in the company's property, the property consisting of a store and stock of goods (furniture) therein, and some other personal property, the whole worth about twenty-five thousand dollars, the sale to be at cost for most of the property, the balance to be taken at an appraisal if the parties could not agree on its value, the terms of the sale to be cash on delivery, and either party who should break the contract was to forfeit to the other the sum of five hundred dollars.

Held: That the five hundred dollars were intended by the parties to be liquidated damages.

ON report of facts agreed.

Assumpsit for five hundred dollars and interest.

The material facts are stated in the opinion.

N. and J. A. Morrill, for the plaintiff, cited: *Williams v. Vance*, 30 Am. Rep. 28, note; 2 Sedw. Dam. (7th ed.) 244, note, 246, note; *Dwinel v. Brown*, 54 Maine, 470; *Lynde v. Thompson*, 2 Allen, 456; *Hull v. Crowley*, 5 Allen, 304; *Streep v. Williams*, 48 Penn. St. 450; *Bagley v. Peddie*, 16 N. Y. 471; *Leary v. Laflin*, 101 Mass. 334; *Chase v. Allen*, 13 Gray, 42; *Gobble v. Linder*, 76 Ill. 157.

Savage and Oakes, for the defendant.

Whether a contract may be one to pay liquidated damages or a penalty, will be, to a great extent, determined by construction, by a consideration of the terms of the instrument, the subject matter, and the intention of the parties. 1 Am. Dec. 331, note; 17 Wend. 447; 22 Wend. 201; 11 Mass. 76; 13 Gray, 42.

The dividing line between "liquidated damages" and "penalties" has never been, and perhaps can never be clearly drawn. Some general rules, however, obtain.

In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, and not as liquidated damages. *Tayloe v. Sandiford*, 7 Wh. 13. (Opinion by Ch. J. Marshall.); *Spear v. Smith*, 1 Denio, 464.

It is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty, and not as liquidated damages; for, by treating such sums as a penalty, the recovery can be apportioned to the actual damages, or loss actually sustained. *Leggett v. Mutual Life Ins. Co.* 53 N. Y. 394, and cases cited in note to *Tayloe v. Sandiford*, 7 Wh. 13 (Lawyers' Edition,); *Shute v. Taylor*, 5 Met. 67.

Where the agreement imposes several distinct duties or obligations of different degrees of importance, and the same sum is named as damages for a breach of either indifferently, the sum is to be regarded as a penalty. See cases cited in same note; *Chase v. Allen*, 13 Gray, 42.

Where the damages are capable of being known and estimated, the sum fixed upon as damages will be treated as a penalty, though declared to be intended as liquidated damages. See cases cited in same note.

Where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to be the latter. *Bagley v. Peddie*, 5 Sandf. 192; II Bouvier Law Dict. Tit. Liq. Dam.

The foregoing rules are supported by a note to *Graham v. Bickham*, 1 Am. Dec. 335, in which all the leading English and American decisions on this subject are compiled and collated.

This is clearly a case where the damages are capable of being known and estimated under rule.

The subject matter of the contract was certain real and personal property, all of which had an easily ascertainable market value.

The contract price was ascertainable by mere computation, and the damages occasioned to either party would be easily and accurately ascertained. *Graham v. Bickham*, 1 Am. Dec. 328; *Spencer v. Tilden*, 5 Cow. 144.

The agreement provides for the purchase and sale of the property; the taking the account of stock; the making the deeds and transfers; the choice of disinterested parties to appraise the value of any of the property about which the parties were unable to agree; and the payment of the expenses attending dissolution of the copartnership, etc.

For the breach of any one of these particulars, the same sum, five hundred dollars, is named as a forfeiture. *Watts' Ex'rs v. Shepherd*, 2 Ala. 425; *Sawyer v. McIntyre*, 18 Vt. 27; *Jackson v. Baker*, 2 Edw. 471.

If the parties use the term "penalty," it is well nigh conclusive that penalty is intended and not liquidated damages. While the use of the term liquidated damages is not at all conclusive. *Sedgwick on Dam.* 6th ed. 504.

In construing the use of the words "forfeit" or forfeiture, all courts lean very strongly to the notion of a penalty, and in some cases it is said that "where the contract itself terms such gross sum a forfeiture, it must be construed to be a penalty, and the parties deemed to have so intended, unless the agreement plainly indicates that it was intended as liquidated damages." *Colwell v. Lawrence*, 36 How. 306. (New York Ct. of App.)

Having thus cited certain general rules, within which, as it seems to us, this case must lie, and by which it must be controlled, we now cite certain decided cases to illustrate the rules. *Horner v. Flintoff*, 9 M. and W. 678; *Betts v. Burch*, 4 H. & N. 506, (Eng. Exchq.); *Magee v. Lavell*, L. R. 9 C. P. 107; *Dennis v. Cummings*, 3 Johns. Ch. 297; *Shiell v. McNitt*, 9 Paige, 101; *Spear v. Smith*, 1 Denio, 464; *Gray v. Crosby*, 18 Johns. 219; *Perkins v. Lyman*, 11 Mass. 82; *Lampman v. Cochran*, 2 Smith, (N. Y.) 275; *Leggett v. Mut. Ins. Co.* 53 N. Y. (Ct. of App.) 394; 15 Mass. 488; 1 Peck. 443; 14 Gray, 165; *Curry v. Larer*, 7 Penn. St. 470 (49 Am. Dec. 486); *Robeson v. Whitesides*, 16 S. & R. 320; *Heard v.*

Bowers, 23 Pick. 455; *Fish v. Gray*, 11 Allen, 133; *Brown v. Bellows*, 4 Pick. 179. Where the forfeiture has been held to be liquidated damages, it has been either because the case came within the rule of *Holbrook v. Tobey*, 66 Maine, 410, or because of some peculiarity in the contract or in the subject matter, the damages have been deemed uncertain and incapable of estimation. *Nobles v. Bates*, 7 Cow. 306; *Williams v. Dakin*, 22 Wend. 201; *Chase v. Allen*, 13 Gray, 42; *Cushing v. Drew*, 97 Mass. 445.

PETERS, C. J. One partner agreed in writing to sell to a copartner his interest in the company's property, consisting of a store, a stock of goods, furniture therein, and other property,—most of the same at cost, and the balance at an appraisal if the parties could not agree upon its value, cash to be paid therefor on delivery,—either party who should break the contract to forfeit to the other the sum of five hundred dollars. The purchaser, after binding himself to the bargain, refused to carry it into execution. The entire property was worth upwards of twenty-five thousand dollars.

Is the sum of five hundred dollars recoverable by the would-be seller as liquidated damages? We think that must have been the intention of the parties. There are several reasons which have an influence in inducing us to think so. In no view was it a large or an unreasonable sum to pay for the seller's disappointment. It was the purchaser's proposition. It includes all which the purchaser was to pay for a total failure to perform. There would be more question about the meaning of the parties, had the non-performance been partial only. It would be a difficult and expensive task to ascertain what the real damages were. The good will of the business was an element of value not easily measurable. The parties wisely concluded to have the damages assessable at an agreed sum. We think it would be the instinctive judgment of business men generally, that the parties used the word forfeit in a conversational sense, and not technically.

The case belongs to a class of difficult, and often uncertain and shadowy questions, very few cases being much alike, and there-

fore an appeal to the authorities for support is not of much use further than to make an application of general principles. But the case of *Lynde v. Thompson*, 2 Allen, 456, relied on by the plaintiff, goes a good way towards establishing the position he contends for; and *Holbrook v. Tobey*, in our own state, (66 Maine, 410,) goes in the same direction.

*Defendant defaulted for \$500 and interest
from February 15, 1883.*

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ.,
concurring.

Ex parte ANDREW P. MORGAN and others, appellants.

In re NATHANIEL S. BOOTHBY.

York. Opinion December 21, 1885.

Insolvent law. Composition. Appeal. Discharge.

An appeal does not lie to the Supreme Judicial Court from a decree, by the court of insolvency, allowing a discharge to an insolvent who has made a composition settlement with his creditors, even though one cause of appeal be that the judge below refused to compel the insolvent to undergo an examination concerning his property at the request of creditors dissatisfied with the settlement.

REPORT of facts agreed.

Appeal from decree of the judge of the court of insolvency in granting a discharge to the insolvent and in refusing to allow an examination of the insolvent on the motion in writing of the appellants.

N. and H. B. Cleaves, for the appellants.

H. Fairfield, for the insolvent.

PETERS, C. J. It is here claimed that an appeal lies from the allowance of a discharge of an insolvent who made a composition settlement with creditors. The case of *In re Hoyt*, 76 Maine, 394, is an authority directly opposed to such claim. The appellant contends that an appeal should be open to him in the

present case, because he was denied the privilege of having the insolvent personally examined concerning his property. But that refusal by the judge, gave no cause for an appeal. It was designed that a single creditor should not be enabled to block or delay such a settlement. The idea of the law is, rapid proceedings and speedy settlements. Delays have a tendency to lessen the amount of an insolvent estate. There are a great many matters in insolvency proceedings which must be finally settled by the judge. He could see no expediency in an examination of the debtor after the composition agreement was entered into; and we see none.

Appeal dismissed.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

STATE OF MAINE *vs.* REUBEN C. HALL and another, appellants.

Kennebec. Opinion December 26, 1885.

Intoxicating liquors. Amendment.

A warrant for search and seizure under § 40, c. 27, R. S., relating to intoxicating liquors, served by a constable of the county legally authorized to serve such process, but to whom no direction has been given in the warrant, is legally amendable at any time before final judgment, under § 57 of said chapter, the omission of such direction being only matter of form.

An amendment inserting such direction being but matter of form, is within the power, as well as the discretion, of the court until final judgment.

ON EXCEPTIONS from superior court.

W. T. Haines, county attorney, for the state, cited: *Com. v. Henry*, 7 Cush. 512; *Tubbs v. Tukey*, 3 Cush. 438; *Hearsey v. Bradbury*, 9 Mass. 95; *Morrill v. Cook*, 35 Maine, 207; 2 Hawkins, P. C. c. 13; 1 Hale, P. C. 581.

H. M. Heath, for the defendants.

This warrant was directed to the town or city constables but it was served by the state constable for Kennebec county.

Some decisions have held that civil writs may be served by constables if otherwise within their powers though not directed to them.

In *State v. Kenniston*, 67 Maine, 558, the return was made by an officer to whom the search warrant was directed. It was held that the state could not show that the seizure was in fact made by another officer. That case was affirmed in *State v. Longfellow*, decided in Kennebec, 1884, no opinion.

I submit that both these cases rest upon the principle that the return must be made not only by the officer in fact serving the precept, but also by the officer to whom the process is directed. The officer's return is a part of the allegations to be proved. *State v. Howley*, 65 Maine, 100. But such return cannot be made by an officer who is a stranger to the process.

FOSTER, J. This was a complaint and warrant for search and seizure under § 40, c. 27, R. S., relating to intoxicating liquors. The warrant was issued from the municipal court of the city of Gardiner, and directed to the sheriff of the county of Kennebec or either of his deputies or either of the constables of the city of Gardiner or either of the towns within said county. Service of said warrant and return thereon was made by a constable of the county appointed in accordance with § 62 of said chapter. The case having been appealed to the superior court, a motion was made to dismiss the proceedings on the ground that the officer whose name was signed to the return upon the warrant had no lawful authority to serve the same. The court overruled the motion, and the case is before this court on exceptions.

The warrant was served by an officer who had legal authority to serve the same, had it been directed to him. Such authority is specially conferred by statute; and, in this particular class of cases, the powers and duties of such constables are co-ordinate with those of the sheriff of the county and his deputies.

Was the want of such direction in the warrant such as to render the proceedings of the officer in executing it null and void? Our opinion is that it was not.

To be sure, it has been held that a constable has no authority to serve process in a civil action unless it is directed to him.

Wood v. Ross, 11 Mass. 271; *Brier v. Woodbury*, 1 Pick. 365; *Hearsey v. Bradbury*, 9 Mass. 95. And yet in the case

last cited, where a motion was made to abate the writ, and in numerous other cases where the same doctrine is affirmed, it has been decided that where a constable had served a writ which was not directed to him, it might be amended by inserting such direction, and thereby the same would be made good. *Converse v. Damariscotta Bank*, 15 Maine, 433. The omission of such direction in civil processes is held to be but matter of form and amendable even after service has been made. *Hearsey v. Bradbury*, 9 Mass. 95; *Wood v. Ross*, 11 Mass. 276; *Rollins v. Rich*, 27 Maine, 561; *Morrell v. Cook*, 35 Maine, 211; *Brown v. Dudley*, 33 N. H. 514; *Aldrich v. Aldrich*, 8 Met. 106.

In *Parker v. Barker*, 43 N. H. 36, the writ was served by a constable to whom no direction had been given in the process; motion was made, overruled, and exceptions taken as in the case at bar, and the court say: "But an omission to insert the proper direction, if the writ is served by the proper officer, is not fatal. It may be amended on motion, and leave granted to insert the proper direction, and the objection will be thus obviated."

A question somewhat analogous to that we are now considering arose in the case of *Bassett v. Howorth*, 104 Mass. 224, where, in a bastardy process, the warrant upon which the defendant was arrested was served by an officer to whom it was not directed. The same objection was interposed by motion to dismiss the complaint on the ground of insufficient service of the warrant, and the court say: "If the incapacity of the officer to serve this warrant consisted merely in the omission of the words appropriate to show that he was the proper officer to serve it, and that the case was one in which, with proper words of direction, he could lawfully have acted, the objection would be merely to the form of the process."

Our own court, while fully recognizing the doctrine laid down in *Hearsey v. Bradbury*, *supra*, has given expression upon this subject in the following language: "No objection is perceived to the service of a writ by a constable duly empowered, though it is not directed to him. He might not be obliged to make it, unless the precept was directed to him, but he may do

the act without such direction, which being a mere matter of form cannot be necessary to give it validity." *Morrell v. Cook*, 35 Maine, 211.

The cases to which we have referred relate more particularly to processes in civil actions, in which the omission of the proper direction is held to be only matter of form and amendable. Whether the analogy might or might not hold good in the general domain of criminal proceedings, it does not now become necessary to determine, inasmuch as the statute under which these proceedings are instituted (§ 57) specially provides that "any process civil or criminal, legally amendable, may in any stage of the proceedings be amended in any matter of form, without costs, on motion at any time before final judgment."

Hence it may be seen that virtually the same authority exists in regard to amendments in matters of form in proceedings legally amendable under this statute, as in relations to actions of a civil nature. The statute is broad in its terms, allowing amendments at any time before final judgment. Whatever distinction there may be existing between civil and criminal processes, as to amendments even in matters of form, this statute has abrogated in this particular class of cases. Such amendments are within the discretion of the court, and authorized by positive enactment. Here, as we have remarked, the warrant was served by an officer whose authority to serve the same is unquestioned, had it been directed to him. An amendment inserting such direction, being but matter of form, was within the power as well as the discretion of the court until final judgment. *Bolster v. China*, 67 Maine, 553; *Harvey v. Cutts*, 51 Maine, 607.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

ARTHUR S. COLE vs. JOHN C. BABCOCK.

Kennebec. Opinion December 22, 1885.

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Pleading.

In personal actions the time of every traversable fact must be stated in the declaration; that is, every traversable fact must be alleged to have taken place on some particular day.

In a declaration to recover damages for alleged slanderous words, the only allegation in reference to time was that the words were uttered "about the first of April, 1884." *Held*, That the word "about" rendered the allegation of time indefinite and uncertain.

ON EXCEPTIONS from superior court.

Action of slander. On the third day of the return term the defendant filed a demurrer to the plaintiff's declaration. The court overruled the demurrer *pro forma* and to this ruling the defendant alleged exceptions.

The opinion states the material facts.

A. M. Spear, for the plaintiff.

Clay and Clay, for the defendant.

FOSTER, J. Action on the case to recover damages for alleged slanderous words which the plaintiff claims were spoken of and concerning himself. The case comes before the court on demurrer to the declaration which contains three counts, in each of which the words are alleged to have been uttered "about the first of April, 1884."

In neither count has the plaintiff definitely set out the time when the alleged words were uttered. There is not that certainty as to time which the fundamental rules of pleading require to be alleged in reference to traversable facts. "In personal actions, the pleadings must allege the time; that is, the day, month and year when each traversable fact occurred." Stephen on Pleading, Ch. II, § IV, Rule 2; 1 Chitty's Pl. 257. "It is a general rule of pleading in personal actions, that the time of every traversable fact must be stated; that is, that every such fact must be alleged

to have taken place on some particular day." Gould on Pleading, Ch. III, § 63. And it is held that this rule applies where it is not material to prove the time as laid. *Platt v. Jones*, 59 Maine, 241. The word "about" renders the allegation of time indefinite and uncertain. *Platt v. Jones*, *supra*; *State v. Baker*, 34 Maine, 52. A reference to the decisions where this question has been adjudicated is all that is necessary. *Gilmore v. Mathews*, 67 Maine, 520; *Gray v. Sidelinger*, 72 Maine, 114; *Moore v. Lothrop*, 75 Maine, 302; *Ring v. Roxbrough*, 2 Crompt. and Jervis, 418. Whether an amendment may not be allowed can be settled by the court below.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

SAMUEL ROUNDS, plaintiff in error, *vs.* STATE OF MAINE.

Cumberland. Opinion December 22, 1885.

Forgery. Indictment. Pleading. Practice.

An indictment for forging an order on a savings bank, may properly allege that the intent of the forger was to defraud the person whose name is forged; and such intent will be conclusively presumed from the fact of forgery without further proof.

A general verdict was rendered against a person accused of forging an order on a bank; one count in the indictment alleging the intent to have been to defraud the bank, and other counts to defraud the pretended drawer of the order, and after verdict the first named count was removed by *nolle prosequi*. Held, that the record is not thereby rendered erroneous. It is immaterial whether the jury based the verdict on one count or on all the counts; the offense was one and the same under each count, and there is no repugnancy between the counts.

State v. Rounds, 76 Maine, 123, affirmed.

ON REPORT on the writ and record.

Writ of error which contained the following assignment of errors.

"And now, on the fifth day of June, in the year of our Lord one thousand eight hundred and eighty-four, comes Samuel Rounds, who is now held on a judgment, warrant and process of

the superior court within and for the county of Cumberland and State of Maine, on an indictment wherein the said State of Maine proceeded against him, the said Samuel Rounds, and on said judgment said court ordered the said Samuel Rounds to be punished by confinement to hard labor for the term of three years, and that said sentence be executed upon him in and within the precincts of our State prison situate at Thomaston in our county of Knox; and says that in the judgment, record and process aforesaid, against him, the said Samuel Rounds, there is manifest error, to wit:

"1. That by said indictment and record it appears that the plaintiff in error was in the indictment charged with three separate and distinct offences; that said indictment by the two first counts charged the said plaintiff in error with forging an order with intent to defraud and injure Frank E. Snow, the third count charged the plaintiff in error with uttering and publishing as true a false, forged and counterfeit order with intent to defraud and injure Frank E. Snow, and the fourth count charged the said plaintiff in error with forging an order with intent to defraud and injure the Maine Savings Bank; that the jury returned a general verdict of guilty; that when said verdict was so returned and affirmed said indictment contained four counts; that after said verdict and before judgment a *nolle prosequi* was entered to the two last counts in said indictment.

"2. That in and by said record and indictment it appears that the court instructed the jury as follows: 'The attorney for the respondent has requested me to instruct you that because no legal evidence has been offered as to the corporate existence of the Maine Savings Bank, you should return a verdict of not guilty in favor of this respondent. For the purpose of this case I rule that such proof is not necessary in order to establish the allegations in the first and second counts in this indictment which charges the forgery with intent to defraud and injure Frank E. Snow. The last count in the indictment charges the crime of forgery with intent to defraud the Maine Savings Bank, consequently you will confine your attention to the first and second counts in the indictment,' and that the court allowed the jury to

return a general verdict of guilty on all the counts in said indictment and received and affirmed said general verdict.

" 3. That by the verdict as returned by the jury and affirmed by the court the plaintiff in error was found guilty on the last count in said indictment; that said count had been removed by a *nolle prosequi* before judgment.

" 4. That after the last two counts in said indictment had been *nol prossed* the indictment stated no offence in law against the plaintiff in error.

" 5. That the allegation contained in the first and second counts of the indictment, that the order set out in said counts was forged with intent to defraud and injure Frank E. Snow, is inconsistent in law with the order, as by that order Frank E. Snow could not be injured or defrauded.

" 6. That the presiding judge should have directed a verdict of acquittal on the last count in the indictment and not have submitted to the determination of the jury the question of the respondent's guilt upon that count.

" 7. That the order set out in each count of the indictment is inconsistent with the material allegations in the first two counts of said indictment.

" 8. That the material allegations contained in said indictment as it stood after a *nolle prosequi* had been entered to the third and fourth counts of said indictment, was inconsistent with a verdict of guilty on the first and second counts of said indictment.

" 9. That the fourth count in said indictment was the only count sustained by the order introduced and set out in said indictment, and the entering a *nolle prosequi* to that count removed the only count upon which judgment could be legally pronounced.

" 10. That the court had no power to direct or allow a *nolle prosequi* to the last two counts contained in said indictment after a general verdict of guilty had been rendered.

" 11. That it appears by the indictment and record that the judgment and sentence of the court are illegal.

" 12. That it appears by the record that it was error on the part of the court to refuse to entertain the motion in arrest of judgment offered after a *nolle prosequi* had been entered to the last

two counts in said indictment, as the cause for the motion arose after the *nolle prosequi*, as until then the verdict was sustained upon the said last two counts in said indictment.

" 13. That in and by said record it appears that the jury who returned and affirmed said verdict of guilty against the plaintiff in error was not constituted according to the law of the land.

" 14. That in and by said record it appears that said jury who returned said verdict of guilty against said plaintiff in error acted without a legally appointed foreman.

" 15. The indictment and record after said *nolle prosequi* had been entered as aforesaid, showed a verdict so inconsistent with itself, and so uncertain in law, that no judgment could be entered upon it."

Harvey D. Hadlock, for the plaintiff in error.

The plaintiff's writ of error should be sustained, because of the errors which appear in the assignments numbered one to eleven inclusive.

The common form of an indictment for forgery sets out an intent to defraud a particular person, and this intent must always be proved as laid. 1 Stark Crim. Pld. (2d Ed.) 112-180; 3 Chitty Crim. Law, 1042. And if for any reason the person could not, as the case appears in proof, be defrauded by the writing, the defendant is to be acquitted. 2 Bishop's Crim. Law, (7 ed.) § 543.

Every thing which is the natural consequence of the act must be taken to be the intention of the person. *Reg. v. Cooke*, 8 C. & P. 582; *Rex v. Mazagora*, R. & R. C. C. R. 291; *Reg. v. Marcus*, 2 C. & K. 356. The intent to defraud is an indispensable ingredient in forgery, and is of the very *gist* of the offence. *Com. v. Ladd*, 15 Mass. 526. The false making of an instrument without such an intent, will not suffice. *Fox v. People*, 1 N. W. Repr. 702. There must be an intent to defraud some particular person, and the indictment must specify such person. *Barnum v. State*, 15 Ohio, 717; *Williams v. State*, 51 Ga. 535. On the foregoing proposition of law I submit, that the order set out in the first and second counts of the indictment must be such an order as would defraud Frank E. Snow, in order

to sustain a verdict on those counts. That the order does not show an intent to defraud Frank E. Snow is apparent. *People v. Stearns*, 21 Wend. 409; *Clarke v. State*, 8 Ohio St. R. 630. 2 Wharton Criminal Law, 1453; 2 Arch. Crim. Prac. 1604. *Com. v. Stephenson*, 11 Cush. 481; *U. S. v. Shelman*, 1 Baldw. 371; *State v. Rounds*, 76 Maine, 127. It is irregular where there are several counts for the same offence to take a verdict of guilty on more than one count. *Com. v. Fitchburg R. R.* 120 Mass. 372. When the *nolle prosequi* was entered it removed the only count on which judgment could be legally pronounced. The *nolle prosequi* did not change the record, nor make the verdict which the jury rendered any less inconsistent with itself, nor any more certain in law than it was before such entry. *Com. v. Haskins*, 128 Mass. 60; Arch. Crim. Prac. Vol. 1, p. 574.

Orville D. Baker, attorney general, for the state.

PETERS, C. J. In this writ an error assigned is that the counts upon which judgment was rendered, cannot stand, because they allege that the forger's intent was to defraud Frank E. Snow. The forged order was in Snow's name as maker, and of the following tenor: "West Scarboro, January 19, 1882. To the Treasurer of the Maine Savings Bank. Pay to Samuel Rounds the full amount of deposit and interest on my account.

Frank E. Snow."

It is contended that the counts should have alleged that the forger intended to defraud the bank or some person other than Snow; and that there is an impropriety in alleging an intent to defraud Snow, because such a thing is an impossibility. We think otherwise.

It would not be unnatural to suppose that the intention of the forger (Rounds) was to defraud Snow, even if another purpose were coupled with it. If we recollect aright, the defense upon the trial of the indictment was, not that Snow signed the order with his own hand, but that Rounds signed it with the consent of Snow. Endeavoring to substantiate such an agency, when none existed, certainly makes it evident that the prime and particular intent was to defraud Snow.

In most cases of forging commercial paper perhaps the most obvious intent is to defraud some party upon whom the paper is passed. But may not circumstances exist in any case, rendering it possible that the purpose was to injure the person whose name is forged? Does not the forger oftentimes intend to succeed in establishing the feigned as a real signature? Are not deeds and wills falsely made with the idea that the papers will be effectual for the purposes intended by the fabricators? Are not forgeries sometimes so artfully executed that the persons whose names are simulated are sufferers from the act? It is certainly not an extreme idea, to say that, in all cases of forgery, there is in the mind of the perpetrator of the crime, an expectation, often of course not of any very definite character, that he is inflicting an injury upon the person whose name is wrongfully used. The criminal must be aware that such person may be in some peril of loss, and that he will be put to some expense or trouble to protect himself against the forgery.

The plaintiff in error supports his position with no authorities which are pertinent to the point. The authority of the cases and of the book-writers is the other way. Mr. Bishop says that the law presumes that the forger intended to defraud the person whose name is forged, and that the indictment may lay the intent accordingly, whatever the real fact may be. He further says of the forger: "He meant also to defraud the person to whom he passed or attempted to pass the forged writing for value and the pleader may so lay the intent, if he pleases," 2 Bish. Crim. Pro. § 422. The doctrine is well supported by the cases cited by Mr. Bishop in the notes to his text. Other writers on criminal law are fully in accord with him. The old common-law assumed that the person whose name was forged was interested in procuring a conviction and he could not be a witness against the forger. Some American cases have followed the foreign precedents in this respect. See 2 Bish. Cr. Proc. § 429.

A further point of objection to the record is incidentally taken in the argument. It is said that the general verdict finds that the intent was either to defraud the bank or Snow, and removing by *nolle prosequi* the counts alleging fraud upon the bank, leaves

an uncertainty whether there was a finding of an intent to defraud Snow. This question was carefully considered and definitely settled when the case was up before. *State v. Rounds*, 76 Maine, 123.

It was there held immaterial whether the finding was that the respondent intended to defraud the bank or Snow. The offence was one and the same, whatever the intent. And the proof would be precisely the same, whether to show the one or the other intent. The allegation might be either way, and the result would be the same. It would not have been inconsistent to allege both intents in the same count. There is no inconsistency between them. Both may exist in the same mind at the same time. In fact, the allegation needed no proof. The respondent would not have been allowed to swear that his motive was to injure the bank and not Snow. Mr. Bishop says (2 Crim. Proc. § 427) : "Where the intent alleged is to defraud the person whose name is forged, it should be presumed from the forgery without further proof."

The case of *Com. v. Haskins*, 128 Mass. 60, cited by the plaintiff in error, is not relevant. In that case there was a general verdict on different counts setting forth, not the same offence, but distinctly different offences, two distinct crimes entirely inconsistent with each other. Nor is *Com. v. Fitchburg R. R. Co.* 120 Mass. 372, also cited by plaintiff, a supporting authority; although rather a radical decision, and differing somewhat from previous cases. In that case there were separate verdicts on counts setting out one offence in several different ways totally repugnant to one another. It required different and contradictory evidence to support the counts. A person cannot be killed in several different ways, as there alleged.

The cases cited in the former opinion clearly justify the conclusion there reached. *State v. Whittier*, 21 Maine, 341, covers the ground of the case. And *Regina v. Cooke*, 8 C. & P. 582, is a pertinent authority.

Judgment affirmed.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

JOHN K. CARLTON and others, in equity,

vs.

THE ROCKPORT ICE COMPANY.

Knox. Opinion December 22, 1885.

False representations. Equity. Equity practice.

Complainants sold to defendant an ice house privilege worth, besides betterments on it, about one thousand dollars for fifty dollars; defendant's agent represented to owners that the property had been sold for taxes, and he thought it could not be regained, that there were no buildings on it, and that it was valueless; there were buildings on it, but not belonging to the land, and there was a tax-title upon it, though not valid; the defendant recovered the land under the deed from complainants by a litigation costing them more than half the value of the land, and was obliged to purchase the betterments; the father of all the complainants but one, (his widow,) and the title was inherited from him, had for nearly twenty years, to their knowledge, abandoned the property, receiving no rents nor paying taxes; complainants could have visited the property in a day, and could have inquired about it at any time by telegraphic communication; another person had approached them to sell the property; and they were some days deliberating before a sale was made to the defendant.

Held, in a bill in equity brought to cancel the deed because of the alleged fraud, that the representations, excepting the statement that there were no buildings on the land, being unaccompanied by any circumstance or fact, were merely expressions of opinion concerning the property.

Held further, that it is not satisfactorily proved that the complainants were induced by the defendant's representations to sell the property; they sold upon their own knowledge of the property and its situation, being unwilling to attempt to rescue the property through an uncertain and costly law suit.

In equity, a finding is not set aside for the improper rejection or reception of testimony, if the full court decides upon the whole facts that the verdict or decree below is satisfactory.

ON EXCEPTIONS.

Baker, Baker and Cornish, and *G. H. M. Barrett*, for the plaintiffs.

A. P. Gould, for the defendant.

PETERS, C. J. The complainants seek to have a deed canceled which they gave to the defendants, conveying an ice house

privilege in Camden ; averring that the conveyance was obtained from them for an inadequate price by fraudulent representations. Three points are presented : *First* : To what extent were there fraudulent representations ? *Second* : Did such representations induce the trade ? *Third* : How great was the inadequacy of price ?

The first and last points are not, at most, very conspicuously sustained by the evidence ; and the weakness of these ingredients of the complainants' case, naturally affects the weight of the evidence bearing on the second point, which we think is not sufficient to uphold the bill.

The untrue representations, alleged to have been made by an agent of the defendants, are, that the property had been sold for taxes, and could not be regained ; that there were no buildings on the same ; that it was a poor location, in a bad condition, and of no value in itself. How much of this was untrue and actionable, if said ? Defendants deny that it was said. The land had been sold for taxes, as represented. Whether it could be regained or not, was largely a matter of opinion or of law ; not a fact was stated why it could not be regained. The representations of poor location, bad condition, and of no value, when spoken of merely the land, were of the nature of expressions of opinion, with no argument, explanation or fact adduced at the time to support them. (See *State v. Paul*, 69 Maine, 217.) The statement that there were no buildings was not literally true ; there were none which belonged to the complainants. The remark, although perhaps not very harmful, had some importance. The land would probably be worth more with buildings on than with buildings off, even though not belonging to the land owner. The trade was no doubt an improvident one for the complainants.

But were they, while exercising a fair degree of care for themselves, deceived into the trade by such assurances of the defendants' agent ? Upon this branch of the case the proof is not sufficient. The burden is upon the complainants. They were sellers and not purchasers. The consideration offered was small and not tempting. They are intelligent persons and of mature years — six in all. What one could not see, another could

suggest. They knew where and substantially what the property was. A half day's time and a small expense would have afforded personal examination. They were several days engaged in the negotiation, and the deed was not completed and forwarded for several days afterwards, — giving ample time for written or telegraphic communication. It is idle to say that they placed reliance on a statement that the property was utterly valueless, when the agent was willing to pay something for it and was urgent to buy. They knew also that another party had previously applied to them to sell.

What did induce them to sell? Was it not their own knowledge of the history of the property? They had often heard John K. Carleton, under whom they were owners as heirs and widow, speak of the property — he not forgetting it on his death bed. They were aware that for many years it had been virtually abandoned by him — that no rents were received or taxes paid. They were informed in relation to the ill success of prior experiments with the privilege. They neglected all care of the property after the decease of the senior Carleton, who died in Boston in March, 1873, not even including it in the inventory of his estate, conveying to the defendants in September, 1877. They knew that they could sue to recover the property from its illegal possessors as well as the defendants could, and one of them as much as said so to the purchaser. They knew that the persons in possession claimed to own the land, and that it would be an expensive thing to attempt to recover it. Their conduct after the deed was given indicates satisfaction on their part. For two years no objection appears, although evidently informed about the property fully, soon after giving the deed. During that period, they in several ways assisted the defendants in their former suit instituted to recover the property — one of them writing what they had done and would do in that behalf, and expressing a hope that their grantees would "come out victorious."

After victory came, however, they were induced by a person associated in the defense of the former litigation, to commence this suit, without any risk or expense to themselves whatever. Their only interest in the speculation will be the sum of three

hundred dollars, one hundred having been already paid to them. Shall this bill be sustained to produce \$300 to them, and to give the balance of the value of the property to one who seeks to obtain it through a litigation tainted by champerty?

As bearing further on that question a word or two should not be omitted upon the point of inadequacy of consideration. Call the land worth \$1000, and defendants' witnesses estimate it as worth less. The price paid was \$50. The defendants found that the deed under which the sellers claimed was not recorded. They gave \$100 for another title, afterwards obtaining the unrecorded deed at some expense. They waged a suit against the person in possession, who claimed in several ways to represent the title. They gained the land by paying for the betterments. But for the superior opportunities which they had of discovering ancient facts pertaining to the property, perhaps the defendants in that action would have prevailed on his plea of title by disseizin. A facetious writer says of a lawsuit, nothing is certain but the expense. The expenses there to those defendants were six or seven hundred dollars; they estimate them more. A lawsuit was indispensable to remove a cloud from the title.

A bill of exceptions was allowed to rulings admitting and rejecting evidence. The briefs of counsel make no allusion to the questions reserved. If not waived, they are immaterial. In equity, a finding is not set aside for the improper reception or rejection of testimony, if the full court decides upon the whole facts that the verdict or decree below is satisfactory. *Larrabee v. Grant*, 70 Maine, 79.

Decree below affirmed with costs.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

SUSAN H. SHANNON

vs.

BOSTON AND ALBANY RAILROAD COMPANY.

York. Opinion December 22, 1885.

Railroads. Negligence. Contributory negligence. Jumping from a moving train.

A person waiting at a railroad station for passage upon a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on

78	52
86	206
78	52
87	472
78	52
102	499
1102	501

the side track while the station room was being cleaned, is entitled to the same protection from the company while in the car as if in the regular waiting room; in either place the person is a passenger in the care of the company.

For a passenger to jump upon or off of a moving train is *prima facie* negligence; if injured thereby, it is incumbent on him, in an action against the railroad, to prove a reasonable excuse for the act.

Whether a passenger had or not a reasonable excuse for jumping upon or off of a moving train is usually a question for the jury; an extreme case either way may be determined by the court. Fear of personal danger is not the only excuse that will exonerate one in jumping from a moving train. A passenger may in some cases be justified in alighting from a moving train merely to save himself from serious inconvenience; all depends upon the speed of the train and the attendant circumstances.

Three ladies, while waiting for the train to start in which they were to take passage, were invited by the station agent to sit in an empty car on a side track while the waiting room was being cleaned, he assuring them that the car would remain there; without signal or notice of any kind, the train to which the car was attached began to be moved out by an engine, without conductor or brakeman on board; startled by the sudden and unexpected movement, and alarmed lest they might be carried away from their intended destination, they hurried to the rear of the car and jumped out, while the train was still abreast of the platform and apparently moving slowly; one of them became injured by jumping; she obtained a verdict against the company; and the court determined that the verdict was not so far amiss on those facts as to require it to be set aside.

On exceptions and motion to set aside the verdict.

Action to recover for personal injuries received in alighting from a moving train at the Columbus Avenue Station in Boston, July 14, 1882.

The verdict was for the plaintiff in the sum of three thousand ninety-one dollars and sixty-six cents.

The opinion states the material facts.

Edwin B. Smith, and *Addison E. Haley*, for the plaintiff.

Mrs. Shannon was a passenger. *Warren v. Fitch. R. R. Co.* 8 Allen, 232; *Snow v. Same*, 136 Mass. 552; *Gordon v. Railroad*, 40 Barb. 546; *Cent. Railroad v. Perry*, 58 Ga. 467, § 2; *Allender v. Railroad*, 37 Iowa, 264; S. C. 43 Iowa, 277; *B. & O. v. Mahone*, 19 Reporter, 757; *Cleveland v. N. J. Stm.* 68 N. Y. 306; *Klein v. Jewett*, 26 N. J. Eq. 474; *Pineo v. N. Y. Cent.* 34 Hun. 80; *Bridges v. No. Lond. Ry.* 7 Eng. & Ir. App. 213; *Armstrong v. N. Y. Cent.* 66 Barb. 437; *Van*

Ostrand v. same, 42 Hun. 592; *Watkins v. Railroad*, 37 L. J. (N. S.) 195; *Doss v. Railroad*, 59 Mo. 27; *Barrett v. Bluck*, 56 Maine, 505; *Carlton v. Fran. I. Co.* 99 Mass. 216; *Hoffman v. N. Y. Cent.* 13 Hun. 589; *Poucher v. N. Y. Cent.* 49 N. Y. 263; *Railway v. Slattery*, 3 Ap. Cas. 1155 (24 Moak Eng. R. 713); *Tobin v. P. S. & P.* 59 Maine, 183; *Campbell v. Portland Sug. Company* 62 Maine, 562; *Wilton v. Railroad*, 107 Mass. 108; *Day v. Brooklyn Railroad*, 12 Hun. 439; *Brown v. Minn. & St. L.* 31 Minn. 554; *P. & R. Railroad v. Derby*, 14 How. 485; *Bennett v. Railroad*, 102 U. S. 580; *Carpenter v. B. & A.* 97 N. Y. 498; *Mulhado v. Brooklyn, R. R.* 30 N. Y. 370; *Newson v. New York Cent.* 29 N. Y. 389; *Pool v. C. M. & St. P.* 56 Wis. 232; *Whart. Neg.* §§ 375, 377, 378, 380, 381, and cases cited.

The plaintiff was not chargeable with contributory negligence. *Shrewsbury v. Smith*, 12 Cush. 177; *Shaw v. B. & W.* 8 Gray, 79; *Holly v. Gas Co.* 8 Gray, 131; *O'Brien v. McGlinchy*, 68 Maine, 558; *McIntyre v. N. Y. Cent.* 37 N. Y. 293; *Snow v. Houst. Railroad*, 8 Allen, 449; *Ernst v. H. Riv. Railroad*, 32 How. Pr. 78; *Harris v. Un. Pac.* 13 Fed. Rep. 592; *Patrick v. Pote*, 117 Mass. 301; *Larrabee v. Sewall*, 66 Maine, 380; *Hobbs v. E. R. R.* 66 Maine, 575; *Gaynor v. Old Col.* 100 Mass. 212; *Whitney v. Cumb.* 64 Maine, 541; *Ross v. B. & W.* 6 Allen, 92; *Lawless v. Ct. Railroad*, 136 Mass. 5; *Barton v. Springfield*, 110 Mass. 132; *Clayards v. Delthick*, 12 Q. B. (Ad. & El. N. S.) *439; *Plummer v. Railroad*, 73 Maine, 593; *Filer v. N. Y. Cent.* 49 N. Y. 47; *Sh. & Red. Neg.* § 31, 282; *Thomas v. West Un.* 100 Mass. 156; *Chaffee v. B. & L. Railroad*, 104 Mass. 108; *Hutchinson Carriers*, § § 641-644; *Johnson v. Railroad*, 70 Pa. St. 357; *Delamatyr v. Milw. Railroad*, 24 Wis. 586; *Railroad v. Stout*. 17 Wall. 663; *Penn. Railroad v. Kilgore*, 32 Pa. St. 292; *Nichols v. R'y Co.* 38 N. Y. 131; *Curtis v. Detroit & M. R. R.* 27 Wis. 158; *Railroad v. Baddely*, 54 Ill. 20; *Jeff. Railroad v. Hendricks*, 41 Ind. 65; *Taber v. Del. & Lac.* 71 N. Y. 489; *Brooks v. B. & M. Railroad*, 135 Mass. 21; *O'Conner v. B. & L. R. R.* 135 Mass. 353; *Galv.*

Railroad v. Smith, 59 Texas, 285; *Tex. Pac. v. Garcia*, 62 Texas, 285; *McDonough v. Metrop.* 137 Mass. 212; *Cumb. Val. v. Maugans*, 61 Md. 61; *Abbey v. N. Y. Cent.* 20 Week. Dig. 37; *Loyd v. Railroad*, 53 Mo. 509; *Kellogg v. Curtis*, 65 Maine, 59; *Beers v. Railroad*, 19 Conn. 566; *Stevenson v. Ch. & Alt.* 18 Fed. R. 634; *Collins v. Davidson*, 19 Fed. R. 86; *Walter v. C. D. & M.* 39 Iowa, 33; *Wilkinson v. Drew*, 75 Maine, 362; *Lindsay v. Chi. Railroad*, 31 Alb. L. J. 18; *Swigert v. H. & St. J.* 75 Mo. 475 (9 Am. & Eng. R. R. Cas. 322); *Flint, &c. Railroad v. Stark*, 38 Mich. 714; *Price v. St. Louis*, 72 Mo. 414; *Straus v. Railroad*, 75 Mo. 185; *Clotworthy v. R. R.* 80 Mo. 223; *Harvey v. Eastern*, 116 Mass. 270; *Hickey v. B. & L. R. R.* 14 Allen, 433; *Caswell v. B. & W.* 98 Mass. 204; *Worthen v. G. T. R'y*, 125 Mass. 99; *Roll v. No. Cent.* 15 Hun. 502; *Stokes v. Saltonstall*, 13 Pet. 181; *Adams v. L. & Y. R'y Co.* L. R. 4 C. P. 744; *Gee v. Met. R'y Co.* L. R. 8 Q. B. 173; *Robson v. N. E. R'y Co.* L. R. 10 Q. B. 271; *Backus v. Start*, 13 Fed. Rep. 71; *Mackay v. N. Y. Cent.* 35 N. Y. 80; *Johnson v. Railroad*, 70 Pa. St. 365.

W. F. Lunt, for the defendant.

"The company have no control over a passenger's movements, and the passenger does not, by the purchase of a ticket put himself under their charge."

In entering the car, from which she afterwards jumped, the plaintiff voluntarily took a position exposed to just the movement she encountered.

In *Sweeney v. Old Colony & Newport R.* 10 Allen, 368, the court say of passengers:

"If they voluntarily take exposed positions, with no occasion therefor, nor inducement thereto, caused by the managers of the road, except a bare license by non-interference, or express permission of the conductor, they take the special risk of that position upon themselves." See also *Hickey v. B. & L. R.* 14 Allen, 433; *Abend v. Terre Haute, &c. R. Co.* 19 Cent. L. J. 350.

The judge ought to have instructed the jury as requested, that if the plaintiff would have been safe if she had not jumped from

the car, her act of jumping, by which she received injury, is evidence that she acted rashly. *Nelson v. North Pac. R.* 26 Minn. 78.

But even when in peril of injury, a passenger is only justified in jumping, if an ordinarily prudent person would have. *Card v. Ellsworth*, 65 Maine, 547; *G. & Rh. Railroad v. Fay*, 16 Ill. 558; *Stokes v. Saltonstall*, 13 Peters, (U. S. S. C.) 181; *Ingalls v. Bills*, 9 Met. 1; 24 Ga. 356; *Jones v. Bryce*, 1 Stark. 402; 36 Ohio St. 418.

Where there is a prospect of collision, a passenger jumping from train may be in the exercise of due care. *Buel v. N. Y. Cent.* 31 N. Y. 314.

The plaintiff was not put to an election in choosing a course to avoid personal hurt. If she had remained quietly in the car she would have received no injury, she was there safe. This fact, is evidence that she acted rashly. Wharton on Neg. sec. 427 and note 1; *Brown v. E. & N. A. R.* 58 Maine, 384.

The ground of the plaintiff's fear as shown by the evidence, was not based upon any apprehension of personal hurt. In her mind it was simply the anticipation of delay and inconvenience. It may be said that such action on her part was perfectly natural, but the reply is that, there are many things natural for man to do, which he is not authorized or justified by law in doing.

"Where a passenger voluntarily leaves a train of cars while in motion, simply to avoid being carried beyond the station where he desires to stop, and in doing so receives an injury, his own negligence is the proximate cause of the injury, and he cannot recover of the company though the conductor was in fault in not stopping the train." *Jeffersonville Railroad Co. v. Hendricks*, 26 Ind. 228; *same v. Swift*, *ib.* 459; *Evansville & Railroad Co. v. Duncan*, 28 *ib.* 441; *Damont v. N. O. & C. Co.* 9 La. Ann. 441; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Morrison v. Erie Railroad Co.* 56 N. Y. 302; *Ill. Railroad Co. v. Slatton*, 54 Ill. 139; *Gavett v. M. & L. Railroad Co.* 16 Gray, 501; *Lucas v. New Bedf. & T. R.* 6 Gray, 64; see also *Burrows v. Erie Ry.* 63 N. Y. 556; 57 Texas, 83; *Harvey v. Eastern Railroad*, 116 Mass. 269; *Brooks v. B. &*

M. Railroad, 135 Mass. 21; *Commonwealth v. B. & M. Railroad*, 129 Mass. 500; *Detroit & Milwaukee Ry. Co. v. Van Steinburg*, 17 Mich. 99, 120; and cases cited.

There was in this case, no evidence of such wrong on the part of the defendant as to put the plaintiff in fear of bodily injury, and drive her to an election, or choice between perils.

Crossing a railroad track without looking and listening for an approaching train is *prima facie* negligence, so this court recently held in *State v. Me. Cent. Railroad*, 76 Maine, 365; 114 U. S. 615; *Wright v. Malden & R. Co.* 4 Allen, 289.

"Where a person walks upon a railroad track, without precautions against the approach of trains, it is *per se* negligence." *Herring v. Wilmington R. Co.* 10 Ired. L. 402; *Harty v. Central Railroad Co.* 42 N. Y. 468; *Terre Haute, etc. R. Co. v. Graham*, 46 Ind. 239; *Holmes v. Cent. R. Co.* 37 Ga. 593; *Maher v. Atlantic, etc. R. Co.* 14 Mo. 267; *Cogswell v. Oregon, etc. R. Co.* 6 Or. 417; *Illinois, etc. R. Co. v. Modglin*, 85 Ill. 481, and numerous other cases.

So crawling under a car, stopped temporarily upon the track. *Ostertag v. Pacific R. Co.* 64 Mo. 421; *Central, etc. R. Co. v. Dixon*, 42 Ga. 327; *Chicago R. Co. v. Dewey*, 26 Ill. 255; *McMahon v. Northern R. Co.* 39 Md. 438.

Riding with a portion of the body protruding from the car windows *per se* negligence. *Todd v. Old Colony R. Co. ib.*; *Pittsburg R. Co. v. Andrews*, 39 Md. 329; *Indianapolis R. Co. v. Rutherford*, 29 Ind. 82; *Morel v. Mississippi Ins. Co.* 4 Bush. 535; *Pittsburg Ins. Co. v. McClurg*, 56 Pa. St. 294; *Louisville R. Co. v. Sickings*, 5 Bush. 1; *Holbrook v. Utica R. Co.* 12 N. Y. 236, enough to justify a non-suit.

Courts in other states have held that leaping from a train knowing it to be in motion, is *per se* negligence. See cases cited.

And to go between unshackled cars, where a train is being made up, held negligence *per se*, 1 Allen, 190.

What is the logic, where the sound reason, that authorizes the court to say that crossing a track without looking and listening is negligence, yet will prevent it from saying, that jumping from

a quickly moving train is negligence? Common knowledge shows it to be a hazardous act.

PETERS, C. J. The most important facts of the case are these: "The plaintiff was at the defendants' station on Columbus Avenue in Boston, with a ticket which entitled her to a passage from that place to Wellesley Hills, another station on their road. She had to wait some time for an expected train. While she and two other ladies, strangers to her, were seated in the waiting room, some persons came in to clean the room. The three ladies applied to the ticket agent for leave to sit in his office, a separate apartment, which was not granted because that room was also to be cleaned. Leave was then asked,—it was in July,—to take seats upon the platform, and that was denied as being against the rules of the road. The agent said, "you can go into those empty cars"—cars standing beside the platform—adding the remark that the cars would remain there and they could wait in them. Thereupon they seated themselves in the rear car. They had not been there long, when without any previous signal or notice the train began to be moved by an engine out of the station. Startled by the sudden and unexpected movement, the occupants hurriedly passed to the rear of the car and jumped to the platform, the plaintiff receiving an injury thereby. Upon these and other less important facts, by means of motion and exceptions, several questions are presented.

It is contended that the judge erred in instructing the jury that the plaintiff was under the protection of the road as a passenger while she was in the car; it is admitted that she was a passenger before she entered and after she left the car. The position of the defendants is that she was in the car at her own risk—that the relation of carrier and passenger was terminated or suspended while she was in the car, just as much so as if she had gone entirely out of and away from the station for the time being. Much stress is placed upon the alleged fact, that the three ladies were permitted to go into the car, but were not required or directed to do so. That is not our view of the affair. Nor do we think that the authorities cited for the defendants, bear out their position.

It may be, that a person waiting at a station would not be in the condition of a passenger, while wandering about the yard or entering cars for purposes disconnected with the act of traveling, although his conduct in that respect is not objected to by the agents of the road. He is acting on his own responsibility for the time. That is not this case. Here the agent apprised the plaintiff that she could sit in the car as a substitute for a waiting room. It was more than a mere toleration of the act — a passive permission to enter the car — it was a positive invitation to do so.

It is contended in behalf of the defendants that, upon other grounds it should have been ruled, as a matter of law, that the plaintiff cannot recover. First, because it is an imperative rule that a person cannot recover for an injury caused by jumping from a moving train, unless the act be done through fear of an impending danger. Secondly, because, even if the rule is more comprehensive than that, there is not in the evidence sufficient excuse for the plaintiff's act to allow the question to be submitted to a jury.

There cannot be a doubt, that, generally speaking, a passenger is not justified in getting upon or off of a moving train; unless at his own risk. If all you know of it is that a passenger jumps from a train in motion and is injured, you would charge him with carelessness for the act. The act is, *prima facie*, negligence. But the question, whether the case belongs to the court or jury for decision, arises when the excuse offered for the act is considered. And there can be no imperative rule governing that question, unless the defendants be right in their contention that fear of personal danger is the only excuse for jumping from a moving train; and in that position we do not concur with the defendants.

There is a good deal of well considered authority which exonerates a passenger from blame, who, being suddenly put into a condition of nervous excitement and alarm by the fault of the railroad, under the impulse of the moment jumps from a moving train before it has attained much speed, although the passenger's motive in doing so is merely to save himself from

serious inconvenience. Whether a justification exists or not must depend upon the speed of the train and other circumstances. One test, among others, would be whether the passenger did what careful and experienced persons generally would be likely to do in similar circumstances. Whar. Neg. § 377, and cases in note; *Robson v. Railroad*, L. R. 10 Q. B. 271; *Adams v. Railroad*, L. R. 4 C. P. 744; *Filer v. Railroad*, 49 N. Y. 47; S. C. 59 N. Y. 351, and 68 N. Y. 124; *Johnson v. Railroad*, 70 Penn. St. 365; *Delamatyr v. Railroad*, 24. Wis. 586.

As already intimated, the burden is on the plaintiff to prove that she was not guilty of contributory negligence; that is, that she had good excuse for her act. The same evidence which describes the occurrence may be proof enough upon the point; but if not, other proof must be adduced. If the excuse set up be plainly insufficient, the law disposes of the case. If it be an extreme case — a clear case either way — the law determines the question, — because a court and jury should decide alike in such case. But from the nature of things there can be no definite rule applicable to such a variety of facts as the cases are likely to present. Therefore the usual practice is to submit the case to a jury under the guidance and with the aid of the court. The rule that a person shall look and listen before crossing a track, relied upon by counsel as analogous, stands upon a different reason. There can be but few exceptions on explanations under that rule. Nor does it take a case from the jury because all of the evidence comes from the plaintiff's side. Even though the facts are undisputed, if they are of such a nature or pertain to such a matter that different minds might reasonably exercise different judgments upon them, the question to be decided belongs to the jury. *Lesan v. Railroad*, 77 Maine, 85, 91.

Upon the facts, we do not think the verdict is so far amiss that we should be justified in setting it aside. The case is exceptional — extraordinary. The defendants' negligence is undoubted. The plaintiff was greatly frightened in her dilemma caused by their fault. The car began to move with neither conductor nor brakeman on the train to explain the movement. It

could not be conjectured by the occupants where the train was going, and the case does not inform us where it went. The plaintiff's alarm was naturally increased by the prospect that her companions might get out and she be left. Her bundles had been thrown out. She saw the others land safely upon the platform, and it was their judgment that she could safely jump. They urged her to do so. She could have alighted safely probably had she observed how it should be done. The mistake was more in the manner of jumping than in the act itself. While we cannot know the exact rate of speed attained by the train, the cars were yet abreast of the platform, and were apparently moving slowly. Under all of these stimulations the attempt was made. The decision to jump or not had to be made almost in a twinkling. A person's judgment in such circumstances should not be too nicely criticized by those whose carelessness produced the predicament. We cannot measure the act wholly by its unexpected consequences.

The damages were assessed by the jury with rather a liberal hand, but not at such an extravagant amount as to justify us in granting another trial that they may be reduced.

Motion and exceptions overruled.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

PORTLAND AND ROCHESTER RAILROAD COMPANY

vs.

INHABITANTS OF DEERING.

Cumberland. Opinion December 22, 1885.

Railroads. Crossings. Land damages. Constitutional law. Evidence.

In assessing damages to be recovered by a railroad corporation against a town for its land taken by locating town ways across its track, the jury may take into consideration, in order to ascertain present value, not only the use which the railroad now makes of its located limits at the crossings, but what use it may reasonably be expected it will in the near future make of the same.

It is not an unconstitutional exercise of legislative power to require a railroad corporation to build and maintain highway crossings laid out over its track, so far as such crossings are within its located limits, although the

law imposing such burden was enacted since the railroad was built, the company being subject to the general laws of the state in existence when its charter was granted and such as should be thereafter passed.

Damages are not recoverable, by a railroad company against a town which has laid out ways over its track, for the interference and inconvenience occasioned to its business by the opening of the new ways, nor for any increased risks or increased expense in running its trains caused thereby.

It is admissible for witnesses, who have competent judgment and understand the elements of the question, to testify to their opinion of the damages sustained by a railroad corporation for having a highway located over its track.

This was a petition by the Portland and Rochester Railroad Company for increase of damages on account of certain town ways laid out across its track. The case was heard by a sheriff's jury presided over by a commissioner appointed by the county commissioners. At the hearing the petitioners' counsel noted certain exceptions to the rulings of the commissioner, and upon the filing of the verdict and report of the commissioner in the Supreme Judicial Court the petitioner filed a motion in writing to set aside the verdict, because, among other reasons, of the rulings of the commissioner which are sufficiently stated in the opinion.

The case came to the law court under the provision of Stat. 1880, c. 242. The report states that the party filing the motion did not agree to an adjudication by the court, for the reason that it believed that the questions could be more satisfactorily presented upon report than by exceptions, and therefore reported the case to the law court for judgment upon the law and the facts. The order of the law court of "exceptions sustained" relates to one of the exceptions to the ruling of the commissioner.

William L. Putnam, for the plaintiff.

By various acts of legislation, the railroad corporation is obliged, not only to build and maintain so much of the way as is within the limits of its railroad, if at grade, as in the case at bar, but also, inasmuch as the road is laid out at grade, to do the following things: First. By the provision contained in the present Revised Statutes, c. 51, § 75, to delay running its trains to the low speed of six miles per hour. Second. By § 33, to

the necessity of maintaining signs. Third. By § 34, to the order of municipal officers of the town which laid out the way, to erect gates or maintain flagmen; and Fourth. To the necessity of fencing across the location, or otherwise preventing the access upon its track of cattle and persons from the way laid out.

Part of these things were imposed upon railroad corporations, undoubtedly in the exercise of the police power of the state. So far as they were the exercise of the police power of the state, corporations were compelled to observe them with reference to all ways existing when the several statutes requiring these things were enacted, and to do this, without receiving compensation; but aside from the mere matter of the obligation to construct and maintain the way within the limits of the location, which is expressly imposed upon the corporation, we believe there is no statute, which either denies or affirms that all these matters may or may not be taken into consideration in determining the damages which railroad corporations are entitled to recover by reason of the laying out of new ways.

Therefore it will be observed, the question is not at all the question of the police powers of the legislature, or of the powers of the legislature under the provision subjecting corporations to the general laws of the state; but only a question whether, with reference to damages, the same rule applies to railroad corporations which applies to individuals, and whether they are not, like individuals, entitled upon the consideration of damages to have allowance made for all the existing circumstances and reasonable probabilities, arising either out of the natural condition of things, or out of the condition of things existing by reason of the impositions of the statutes.

In *Old Colony & Fall River Railroad Co. v. County of Plymouth*, 14 Gray, 155, the court held upon general principles, that a railroad corporation situated as the petitioner's, was entitled to some damages.

The reasoning of the court in *Ford v. The County Commissioners*, 64 Maine, 408, clearly assumes that the owner of a right of way may be entitled to damages.

Being entitled to damages, we claim that the same rule is to

be applied to us as to any other person or corporation; that as in case of such other persons or corporations, the town having entered upon our exclusive possessions and laid its way across part of our location, we are entitled to be compensated for all the incidents arising therefrom. *Bangor & Piscataquis Railroad Co. v. McComb*, 60 Maine, 290.

The jury were expressly confined to considering the value of the strips fifty or more feet wide on each side of the main track, in their existing unused condition, and to estimate them precisely as they would estimate them if they were parts of desolate sand plains, removed from all inhabitants, used only for the main track of the road and with no prospect of any possible use for any other purpose.

We claim that this was a clear violation of law and of justice. *Pinkham v. Chelmsford*, 109 Mass. 225; *Boom Co. v. Patterson*, 98 U. S. 403; *Bangor & Piscataquis Railroad Co. v. McComb*, 60 Maine, 290; *Pierce on Railroad Law*, edition of A. D. 1881, 217; *Eastern Railroad Co. v. The Boston & Maine Railroad*, 111 Mass. 125; *Lake Shore & Michigan Central Railroad Company et als. v. The Chicago and West Indiana Railroad Company*, 2 Am. & Eng. Railroad Cas. 452.

Petitioner was refused by the commissioner any allowance for cattle guards, fences and signs warning travelers; which refusal does not appear in harmony with *Old Colony & Fall River Railroad Company v. County of Plymouth*, 14 Gray, p. 155, nor with the expressions of the court in *Massachusetts Central Railroad Company v. Boston, Clinton & Fitchburg Railroad Company*, 121 Mass. p. 124.

Nathan and Henry B. Cleaves, for the defendants.

The requested instruction which was based upon the chance or probability that sidings or additional tracks might be placed at this locality was properly refused.

In *Moulton v. Newburyport Water Co.* 137 Mass. 167, the petitioner attempted to prove that the lands taken by the respondent were admirably adapted to form, at slight expense, a storage basin for water, and offered to prove the value upon

this basis. The court say: "The damages must be measured by the market value of the land at the time it was taken, not its value to the petitioners or the respondent, not the value it might have under different circumstances from those then existing. The petitioners were not entitled to swell the damages beyond the actual fair market value of the land at the time, by any consideration of the chance or probability that, in the future, authority might be acquired by legislation or purchase, to carry the water in pipes to neighboring towns. . . . The value for these special and possible purposes is not the test, but the fair market value of the land in view of all the purposes to which it was naturally adapted."

The court say in *Worcester v. Great Falls Manufacturing Co.* 41 Maine, 163: "In actions *ex delicto*, the damages to be awarded by a jury are a compensation, recompense or satisfaction to the plaintiff, for an injury actually received." See *Bangor and Piscataquis R. Co. v. McComb*, 60 Maine, 290; 100 Ill. 21; *Cobb v. City of Boston*, 109 Mass. 438; *Massachusetts Central Railroad Co. v. Clinton and Fitchburg Railroad Co.* 121 Mass. 124.

The railroad "is not entitled to damages for the interruption and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing the bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travellers crossing its railroad." *Mass. C. R. Co. v. C. & F. R. Co.* 121 Mass. 121; *Chicago and Alton Railroad Co. v. Joliet, Lockport and Aurora R. R. Co.* 44 American Reports, 799; *State v. Noyes*, 47 Maine, 189; *Thorpe v. R. & B. R. Co.* 27 Vermont, 142; *State v. New Haven and Northampton Co.* 43 Conn. 351; *Richmond F. and P. R. R. Co. v. City of Richmond*, 96 U. S. 521; *P. S. & P. R. v. B. & M. R.* 65 Maine, 122; *Wilder v. M. C. R.* 65 Maine, 332; *Boston and Albany Railroad Co. Appellant*, 70 N. Y. 569; same, 52 N. Y. 510.

The testimony of witnesses giving their opinion as to damages was properly admitted. *Shattuck v. Stoneham Branch R. R.* 6 Allen, 115; *Snow v. Boston & Maine R.* 65 Maine, 230; *Swan v. County of Middlesex*, 101 Mass. 173; *Whitman et al. v. Boston & Maine R.* 7 Allen, 313.

PETERS, C. J. The town of Deering laid out two of its new ways over the track of a railroad company, and the question before a sheriff's jury was as to the damages sustained by the company for the easements taken. The commissioner presiding at the hearing instructed the jury that they were simply to estimate the natural and actual direct damages sustained by reason of the crossings, regard being had to the use which the crossings were put to, namely, town ways; but that, in estimating such damages they should not consider the mere probable use in the future to which the land taken might be put by the railroad.

We think the latter branch of the instruction was erroneous. It too closely qualifies or construes the general rule. The jury, in order to decide what the damages were, should have been allowed to take into consideration, not only the use which the railroad was then making of their land, but the use which in all probability it would thereafter make of it. The error, no doubt, occurred from the commissioner having another principle in mind, which he was endeavoring to inculcate correctly to the jury, and that is, that prospective and speculative damages are not recoverable. But a distinction is to be observed between what land may be worth in the future and what it is now worth in view of the future. And as no man can foresee the future with any certainty, we are allowed to base calculations to some extent on the reasonable probabilities of the future.

There is a vast amount of land which is useless, unproductive, and costly to keep, and valuable only for the use which the future is quite sure to bring to it. If the railroad is not likely to make any more extended use of the land than it now does, the damages would be one sum, while if it be sure or in a high degree probable that it will soon make a greater and more

beneficial use of the land, the damages may be another sum. And so it is a general principle affecting such questions, that if the future use of land will in all probability be greater and more valuable than its present use, such probability may be an element to be received into the calculation to establish present value. Property is more valuable on a rising than on a stationary market.

The principle, however, has not expansive tendencies. It is not what use the railroad may possibly make—likely as not make—of the land in the future, nor even what need it may probably have for it at some uncertain and far off day. It is the near, immediate future that may influence; the uncertain, indefinite, doubtful future can not. The doctrine is to be carefully applied. The subject itself does not admit of exact limits. Supposed future value is by no means to be taken as present value. It is an element only, among other considerations, which may afford light upon the question. *Moulton v. Newburyport Water Co.* 137 Mass. 163, 167. The general idea is safely expressed in *Boom Co. v. Patterson*, 98 U. S. 403, where it is said: "The compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the near future." And the authorities are generally to the same effect, the one most fitting the question of the present case being *Railroad v. McComb*, 60 Maine, 290.

We think all other matters were delivered by the commissioner to the jury correctly and clearly. One point taken by the company, however, deserves especial consideration. The jury were instructed not to allow to the company, in the assessment of damages, any of the expense which will be incurred by them in building and maintaining so much of the new ways as are within the limits of their own location. The statute (R. S., c. 51, § 38,) lays that burden on the railroad corporation. The railroad is obliged to build and maintain these crossings at its own expense. But the company contends that, inasmuch as the statute was passed after their charter was granted, it would be

unconstitutional to apply its provisions to highways not in existence when their road was built.

By an amendment of the company's charter, accepted by them, it was provided that "the company shall be subject to the general laws existing in the state, or which may be hereafter passed by the state." Pr. Laws, 1853, ch. 180. (Webb's Railroad Laws, Maine, 497.) See Con. Maine, Art. 4, part 3, § 14. One of those laws is that a railroad charter, such as this, may be amended or altered by the legislature.

The question, therefore, is whether, in view of the power thus reserved to the legislature, the statute relating to railroad crossings, as affecting this railroad in this instance, is or not constitutional. It is impossible to lay down any exact rule as to the lawful extent of the exercise of this reserved legislative power, and each case depends largely on its peculiar facts. But it is universally admitted that the power of alteration and amendment is not without limit. The alterations must be just and reasonable. The vested rights of property of corporations must be respected. The power should be confined to reasonable amendments regulating the mode of using and enjoying the franchise granted, which do not defeat or essentially impair the object of the grant. *Pierce R. R.* 459, and cases; *Cool. Con. Lim.* * 710, and cases.

Under any of the current definitions of this power of amendment, we think the statutory provision under discussion should not be regarded as an unreasonable exercise of such power. Railroad corporations, especially under present laws, receive many compensations for all the burdens imposed on them. The company pays nothing for its franchise; pays no tax upon it; may take a grant under general laws without recourse to the legislature; its road crosses public ways and runs in places along such ways, without compensation to the town which paid for its easement to the original owner; may cross canals and navigable streams under some conditions (and this imposes burdens on other public interests); highways may be raised or lowered for its accommodation (thus affecting the grade of highways and often the convenience and safety of travelers); railroads to a reasonable extent may occupy highways with their trains; and other privileges and accommodations are accorded.

By building and maintaining the town crossing within its own located limits, the railroad company has a control of it — as it should have — and can shape it as best for its own needs, and that is some compensation. Instead of the legislature allowing, as it no doubt might, the right of passing over a railroad in all places where a passage could be effected without injury to the road, it confines the right to a few places — to the public roads. The law even forbids a person walking or standing on a track.

Another reason why the statutory requirement can not be deemed unjust, is, that it could not have been in the mind of the legislature or of the company, when the charter was granted, that so much of the public power was to be surrendered as the argument for the company assumes. Had the present statute been then in existence, it would not have been complained of as unreasonable. Railroad law was at that date in its infancy. Neither party knew what provisions for the preservation of all public rights and interests were needed. They were not inserted in the charter, nor were they then to be found in the statutes of the state. The charter was general, and the location of the line most indefinitely stated. While details were largely omitted, there must have been an unwritten, unexpressed understanding — an implication — that the charter should be subject to all reasonable legislative control. Since then the law has become better defined. The powers and privileges of railroads have been both curtailed and increased. Upon the whole, the legislative treatment of them has been reasonable and just. While the reserved power in this instance may not be deemed strictly a part of the police power of the state, it is something at least akin to it.

The tendency of the authorities sustain these views, and in some of the cases precisely the same question as arises here has been discussed and decided adversely to the railroad. *Cool. Con. Lim.* *577, and discussion in note; *Pierce R. R.* 457, and cases. in note; *Chapman v. Railroad*, 37 Maine, 92; *Norris v. Railroad*, 39 Maine, 273; *Bangor O. and M. R. R. Co. v. Smith*, 47 Maine, 34; *Railroad Commissioners v. Railroad*, 63 Maine, 269; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345;

People v. Railroad, 70 N. Y. 569; *English v. Railroad*, 32 Conn. 240. A contrary decision, however, was made in *Detroit v. Plank Road Co.* 43 Mich. 140. If this result is possibly in some degree inconsistent with the case of *State v. Noyes*, 47 Maine, 189, decided in 1859, it is because that was a strict decision, and the law has made some advancement since that time.

It is not questioned by the town that some damages are recoverable by the railroad; and such must be the law. But damages are not assessable for the interruption and inconvenience occasioned to the business of the railroad by the opening of the new highways, nor for increased expenses nor increased risks in running their trains occasioned thereby. Those are matters clearly of police-regulation, damages for which would be too vague and uncertain for calculation. The claim is illogical if not unjust. *Mass. Cent. R. R. Co. v. Railroad*, 121 Mass. 124.

It was ruled that witnesses could testify to their opinions of the amount of damages that are sustained by the easements taken. It is presumed that the witnesses were, from their experience and observation, competent to express their judgments upon the question, and that they understood the elements upon which the question was based. We think the testimony comes within the limits which renders opinion-evidence admissible.

Exceptions sustained.

VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

WALTON, J., did not sit.

STATE OF MAINE vs. C. WILLIS, JR.

Kennebec. Opinion December 30, 1885.

Indictment. Lottery. Nuisance. Pleading. "Then and there."

It is not necessary to the validity of an indictment for maintaining a lottery-nuisance, that the name of the prosecutor (interested in the penalty) should be either inserted in or indorsed upon the indictment.

A count in an indictment is not ill for duplicity, which avers that the defendant was engaged in "a lottery, scheme or device of chance;" a lottery is a scheme and device of chance.

A count is not amenable to the objection of duplicity, which avers that the defendant printed, published and circulated an advertisement of a lottery. It is a single offence—that of nuisance—no matter in what form the defendant's participation consists. The count describes the means by which his guilt may be proved.

A scheme is none the less a lottery, because it promises a prize to each ticket holder, the prizes to be drawn being of different values; nor because prizes are called presents in the prospectus; nor because the tickets consist of receipts for subscriptions to a newspaper, but numbered to compare with the numbers upon the articles to be distributed.

A count, which charges a defendant with inserting a lottery advertisement in a newspaper published in New York, and circulated in this state, without an averment that the defendant had something to do with its circulation in this state, is bad upon demurrer.

It is averred against the defendant, that, at a place and on a day named, he was concerned in a lottery by selling a ticket to one Henry May; the count describing the lottery and ticket. It would have been more finished pleading to allege that he was so concerned by "then and there" selling the tickets. But the law, not standing upon such nicety, regards the omitted words as immaterial.

The lottery ticket may be set out in an indictment by copy, and, if it does not appear upon its face to be a ticket, it may be alleged and proved to be such.

ON EXCEPTIONS from the superior court.

The exceptions were to the *pro forma* ruling of the court in overruling defendant's demurrer to the indictment.

The facts are sufficiently stated in the opinion.

W. T. Haines, county attorney, for the State, cited: *Com. v. Eaton*, 15 Pick. 273; *Com. v. Harris*, 13 Allen, 534; *Barnes v. State*, 20 Conn. 232; *Com. v. Hooper*, 5 Pick, 42; *Com. v. Dana*, 2 Met. 329; 64 Maine, 423; Whar. Cr. L. §§ 2428—2432; 2 Bish. Cr. L. § 945.

H. M. Heath, for the defendant, contended that the indictment should have disclosed the name of the prosecutor. The opinion in the case of *State v. Smith*, 64 Maine, 425, does not seem to be supported by the cases there cited. The case at bar however is different from that and the cases there cited. *Com. v. Messenger*, 4 Mass. 462, cited approvingly in *State v. Grand Trunk Railway*, 60 Maine, 145, would seem to be precisely in point. The court say: "If the statute had authorized a proceeding by information in any court of record for the recovery of the penalty and the

information had been drawn like the complaint, it is very clear that such information would have been bad, because there is no allegation of the sum of money forfeited, nor of the share which the informer claims," etc. The reasons given for the decision of *State v. Grand Trunk Ry, supra*, are applicable to the case at bar.

By the statute each act in the operation of a lottery is made a distinct and independent offence. To print an advertisement of a lottery is an offence, itself; to publish such an advertisement is another; while to circulate it is still another. By the very nature of these acts neither act includes the other as was said in *Com. v. Clapp*, 5 Pick. 41, where it was said that offering for sale and selling tickets was but one offence because selling included the offering for sale.

Counsel further contended that the advertisement set out in the indictment was not the advertisement of a lottery. It is well settled that a lottery is a scheme for the distribution of prizes by chance. The element of chance is essential. *People v. Noelke*, 94 N. Y. 137; *U. S. v. Olney*, 1 Abb. (U. S.) 275; *Kohn v. Koehler*, 96 N. Y. 367; *Dunn v. People*, 40 Ill. 465.

To be illegal it should appear affirmatively in the advertisement that the distribution of prizes is to be by lot or chance.

PETERS, C. J. The defendant demurs to an indictment which alleges against him participation in a lottery nuisance.

It is objected that it is not stated, either in or upon the indictment, who the prosecutor is. The law apportions the penalty between the prosecutor and the town where the offence is committed. If the law was ever critical enough to destroy an indictment because it did not disclose the name of the prosecutor or informer, when such an averment requires no proof and has nothing to do with the guilt or innocence of the person prosecuted, it was intended, by the decision in *State v. Smith*, 64 Maine, 423, to dispense with such useless technicality.

It is contended that each count is ill for duplicity, because the allegation is that the defendant was engaged in "a lottery, scheme or device of chance." There is no contradiction in the terms.

They are descriptive of only one thing, — the pleader trying to describe the offence by as apt a word as possible. The word lottery has no technical meaning. A lottery is nothing more or less than a scheme or device of chance. *People v. Noelke*, 94 N. Y. 137.

The indictment avers that the defendant was concerned in a lottery by printing, publishing and circulating an advertisement of it; and also in other ways. It is argued that this is ill for duplicity. The argument is based upon a misconception of the design and scope of the law against lotteries. The statute (R. S., c. 128, § 13,) does not establish numerous independent offences, — it establishes but one offence. It declares "every lottery, scheme or device of chance" to be a nuisance. The offence to be alleged and proved is nuisance. The statute particularizes some of the modes in which the offence may be committed, and also declares generally that whoever aids in a lottery or is connected therewith shall be punished. It is but one offence and the same punishment, no matter in what form the guilty participation consists. There are not as many distinct offences as there may be forms of the offence. The indictment describes the means by which the defendant's guilt may be proved. The same rule applies as in indictments for liquor nuisances. *State v. Lang*, 63 Maine, 215; *Commonwealth v. Harris*, 13 Allen at p. 539.

The indictment gives the nature of the scheme by setting out the advertisement by copy; by allowing it to speak for itself. This mode of pleading is not unusual. But it is denied by counsel that the paper indicates a game of chance. It is contended that the word chance in the paper means opportunity. We do not concur in this interpretation. It is conceded that the careless reader might see in the advertisement a game of chance. But that would be so, only because the meaning is there to be seen. In such case the reader gets the author's real meaning, which must be the same for all persons. However disguised by indirect or deceptive expression, the paper, as a whole, discloses a lottery. If it were not so, readers would not become buyers. It informs its patrons that every subscriber is sure to get a present, and the

presents are of various values. Assurance is given that the presents will be "awarded fairly." How can presents of unequal value be fairly awarded unless by some lot or chance? A purchaser or subscriber receives for his money "a numbered receipt." What can be the purpose of numbers if all numbers are favored alike? Each number will take "a prize," and has "a chance to win" a very valuable one. Of course all cannot win the highest prize or present. It is not an opportunity to win, so much as it is an opportunity for a chance to win. It is not an easy thing for a notice to have the effect of advertising vice to one and virtue to another.

The first count in the indictment may not be good. It alleges the defendant's complicity in the nuisance to consist of a notice inserted in a newspaper published in New York. It charges that the newspaper was circulated in Augusta, but it is not said when or by whom, or whether the defendant had any knowledge of that fact or not. See *State v. Paul*, 69 Maine, 215.

The remaining counts are sufficient. The most of an objection is, that the words "then and there" are not employed in them. The use of the phrase would have made the declaration more finished. The second count charges that the defendant at Augusta, on a day named, was unlawfully concerned in a lottery (described) "by selling to one Harry May one ticket," and so on. It is contended that, to be correct, it should read, "by then and there selling" the ticket described. In a capital case the omission would probably be considered fatal. But the rule requiring time and place to be repeated to the traversable averments is not so much regarded in indictments for inferior offences as in cases where the life of the prisoner is in danger. 1 Bish. Stat. Pro. § 413, and cases. The sense here is by no means uncertain. There would be more ground for the objection if a series of distinct overt acts were alleged, all essential to the commission of the offence. *Commonwealth v. Doherty*, 10 Cush. 52. The words then and there need not be repeated to an averment which merely declares a legal conclusion. The averment of being concerned in a lottery was of that nature, although preceding other allegation, the potent fact being the sale of a ticket.

Commonwealth v. Sullivan, 6 Gray, 477; *Commonwealth v. Langley*, 14 Gray, 21.

In the last counts the ticket is set out in its own words. It may not on its face appear to be a ticket. Still, it may be proved to be such. It is averred that it is a ticket. The advertisement proves it. *State v. Ochsner*, 9 Mo. App. 216.

Demurrer sustained as to first count only.

WALTON, DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

BENJAMIN F. OTIS vs. STEPHEN ELLIS, appellant, and trustees.

78	75
87	480

Kennebec. Opinion December 30, 1885.

Practice. Abatement. Appeal. Waiver.

Matter in abatement, whether by plea or motion, must be pleaded in a trial justice's court before a general continuance of the action.

Appealing from the decision of a matter in abatement before the general issue is pleaded, is a waiver of any defense under that issue.

ON EXCEPTIONS from superior court.

The opinion states the case and material facts.

Geo. W. Field, for the plaintiff, cited: *Shaw v. Usher*, 41 Maine, 102; *Fogg v. Fogg*, 31 Maine, 302; *Snell v. Snell*, 40 Maine, 307; *Shorey v. Hussey*, 32 Maine, 579; *Pattee v. Lowe*, 35 Maine, 121.

G. T. Stevens, for the defendant and trustee, contended that the trial justice before whom the writ was entered had no jurisdiction, and his judgment affirmed in the superior court is null and void. R. S., c. 86, § 5; *Mansur v. Coffin*, 54 Maine, 314; *Bigelow v. Stearns*, 19 Johnson, 39; *Penobscot R. R. Co. v. Weeks*, 52 Maine, 456; 2 Saunders, 101; 2 Bac. Abr. 227, 228; *Benner v. Well*, 45 Maine, 483; *Richard v. Walton*, 12 Johns. 434; *Arnold v. Sandford*, 14 Johns. 417; *Scudder v. Davis*, 33 Maine, 576.

The trial justice before whom the writ was entered has no terms of court. The writ was entered one day and continued by consent, to another day, when the motion to dismiss was filed.

That motion was filed on the second day so far as this action was concerned, and thus came within the rules of this court and of the superior court. The magistrate had established no rules as to the time of filing motions or pleas in abatement.

In the case of *Elder v. Dwight Mfg Co.* 4 Gray, 201, it was held that a motion to dismiss a case for want of jurisdiction in the magistrate before whom it was tried might be first made in the court of common pleas to which the case had been appealed.

PETERS, C. J. An action was commenced before a magistrate in Kennebec county, in which the names of two persons were inserted as trustees, one residing in Penobscot and the other in Kennebec county. No service was made on the trustee residing in Kennebec county. Upon the face of the papers the process was abatable. *Mansur v. Coffin*, 54 Maine, 314. An appearance was entered for the defense on the return day and the action continued a week. Upon the adjourned day a motion was made to dismiss the action for want of jurisdiction, upon the ground that a trustee action before a trial justice must be brought in a county in which some one of the trustees resides. The question is, whether the motion came too late. We think it would be the better doctrine to declare that it did.

The general rule is that nothing more than the general issue need be pleaded before justices' courts, title to land and matter in abatement excepted. *Williams v. Root*, 14 Mass. 273; *Vickery v. Sherburne*, 20 Maine, 34; R. S., c. 83, § § 15, 20. (See Laws 1885, c. 255.)

Pleas and motions in abatement should be filed before a general imparlance, which is nothing else than a continuance of the cause till a further day. Bacon Abr. Pleas, C. This is not a rule of court but a rule of law, acted on generally by courts of common law jurisdiction, where there is no rule of court to the contrary. In most courts the time for such pleading is shortened. *Martin v. Commonwealth*, 1 Mass. 347; *Wyman v. Dorr*, 3 Maine, 183, 186.

We do not perceive any objection in applying the rule to justices' courts, and to hold that after a general continuance, (a special

imparlance could be granted), it is too late to interpose the plea. The plea is not a favored one. Neither trial justices nor those who practice before them are, in all instances, legal experts, and it is for the advantage of the court and its suitors that technical questions in abatement should be at the earliest moment made and disposed of. The object of the plea is to avoid further costs if the plea is good. If this rule is not applied, it will be difficult to find a better. The only other definite rule would be to allow a plea in abatement to be filed at any time before the general issue is pleaded. But that would cause unfairness often. A plaintiff should know what plea he is to meet before summoning his witnesses. It is to be admitted that the rule would work somewhat harshly in the present instance, but its effect in cases generally will be beneficial.

What light there is upon the question, afforded by the authorities, seems to favor this view. In *Stiles v. Homer*, 21 Conn. 510, it is said: "Although no time has been limited, either by statute, or by any rule of court, in which such pleas shall be presented, in cases before justices of the peace, and other inferior tribunals, yet it is obvious that they ought not to be received in any stage of the trial. The same reason there exists for requiring pleas to be presented at an early period, as exists in the higher courts." In that case a motion in abatement was rejected as coming too late, although the general issue had not been pleaded. The Vermont court approves and practices upon the rule. *Montpelier v. Andrews*, 16 Vt. 604, note; *Wheelock v. Sears*, 19 Vt. 559; and New Hampshire seems to approve it. *Bedford v. Rice*, 58 N. H. 227.

The appellant contends that, if this motion is overruled, he should be allowed to put in a general defence for himself and the trustee. It is too late. The general issue should have been pleaded before the case came up. Taking an appeal without making any general defense, is a waiver of all questions except the one the decision of which is appealed from. *Waterville v. Howard*, 30 Maine, 103; *Elder v. Dwight Man. Co.* 4 Gray, 201, relied on by counsel as an authority the other way, is not

applicable. There the jurisdiction belonged, not in another county, as here, but to another court.

Exceptions overruled.

WALTON, DANFORTH, LIBBEY, EMERY and HASKELL, JJ.,
concurring.

DANIEL MARTIN vs. WILLIAM H. DARLING and another.

Knox. Opinion January 1, 1886.

Liens. Judgments in rem.

No judgment *in rem* against the property attached, in an action to enforce a lien for labor on granite, will be rendered, where the defendant is the general owner of the property and made the contract for the labor, and no general notice has been given of the suit.

If the defendant in such action is the only person interested in the property attached, there is no necessity for judgment *in rem*; if he is not the only person so interested, no valid judgment *in rem* can be rendered, till all persons so interested have become parties to the suit, or had notice so to do.

ON REPORT on facts agreed.

Assumpsit to recover for labor in blacksmith shop, in a granite quarry, and to enforce a lien claim therefor upon the granite there quarried.

J. E. Hanly, for the plaintiff.

H. A. Tripp, for the defendant.

DANFORTH, J. This case is submitted upon an agreed statement, by which the court is authorized "to render such judgment as the legal rights of the parties require." The amount due from the defendants is agreed upon. The plaintiff is therefore entitled to judgment for that amount. "The legal rights of the parties" neither require, nor authorize, any farther judgment.

The counsel have argued the question as to whether the plaintiff had acquired a lien upon the property attached, and if so, whether it has been lost by taking the note in suit. Any judgment which the court can render under this statement as to the lien will not be binding and therefore useless. If the defendants

74	78
89	233
78	139
97	94
78	78
1106	499

alone are interested, as the contract for labor was made with them, and the property is attachable, a judgment for a lien would add nothing to the security which the plaintiff now has by virtue of his attachment. In such cases and in the absence of general notice given, the law does not authorize a judgment *in rem* to be given, *Byard v. Parker*, 65 Maine, 576, but leaves the question to be settled by subsequent proceedings if necessary. But this necessity can arise only when persons not parties to the case, claim an interest in the property, either as owners, or prior attaching creditors. No judgment could be rendered which would be valid against the rights of such persons until they were notified and had an opportunity to become parties to the action, and be heard. *Parks v. Crockett*, 61 Maine, 489, and cases cited. It is true that since these decisions there has been a change in the statute, so that now in all lien actions where the contract for labor or materials is made with a person not the owner of the property affected, such person may voluntarily appear and become a party to the suit. If he does not, such notice as the court orders may be given him, and he shall become a party. R. S., c. 91, § 44.

But this provision in no respect changes the law as laid down in the cases above cited. The statute does not, nor does it purport to bind any one except such as have become parties to the suit, or had notice to do so, nor, would the judgment be valid as against any others; now, as when the decisions were made, a judgment *in rem*, valid as such against the world, can be rendered only when the world has such notice as the court shall order.

In this case no notice except to the defendant has been given, neither has any person appeared. For that reason no judgment as to the validity of the lien can be given.

*Judgment for the plaintiff for \$221.86
and interest from date of writ.*

PETERS, C. J., VIRGIN, EMERY, FOSTER and HASKELL, JJ.,
concurred.

JOHN H. POTTER vs. J. MCKENNEY.

Androscoggin. Opinion January 4, 1886.

Replevin. Mortgaged property. Attaching officer. Keeper. R. S., c. 81, § 44.

Before a mortgagee of personal property, attached by an officer as the property of the mortgagor and placed in the hands of a servant of the officer for safe keeping, can maintain replevin therefor against such servant he must give the notice in writing required by R. S., c. 81, § 44. The servant may make the same defence that his master, the attaching officer, could make.

ON report on facts agreed.

The opinion states the case and material facts.

John H. Potter, for the plaintiff.

The real question to be determined in this case is this, was it necessary for the plaintiff in order to maintain this action to have first given the notice provided by R. S., c. 81, § 44?

That question can be completely determined by answering another, still more simple. Was J. McKenney properly made the defendant? If he was, then the notice was unnecessary for it is only when the action is to be brought against an attaching officer that the written notice is required.

Counsel then argued that the action could be maintained against the defendant, citing: R. S., c. 96, § 9; *Ramsdell v. Buswell*, 54 Maine, 546; *Eveleth v. Blossom*, 54 Maine, 447; *Douglass v. Gardner*, 63 Maine, 462.

John P. Swasey, for the defendant, cited: 23 Maine, 248; *Drake*, Attachment, § § 353, 356; *Nichols v. Perry*, 58 Maine, 32.

LIBBEY, J. This is replevin of a sleigh and wagon. Plaintiff claims title under a mortgage from one Davis. The property was attached by a deputy sheriff on a writ against said Davis as his property. At the time of the attachment it was in the possession of Davis. The officer who attached it put it into the possession of the defendant to hold as his keeper or servant.

Before bringing his action, the plaintiff did not give to the officer or the defendant the notice in writing required by R. S., c. 81, § 44.

The plaintiff does not claim that he could maintain the action against the officer without first giving such notice, but claims that he was not required under the facts in this case to give the notice because the action is not against the officer.

The question raised is, whether the defendant can make the same defence that the officer could make if the action was against him. We think he can. The defendant is the servant of the officer, holding the property for him. He has all the rights that his master has. His possession is the possession of the attaching officer and the attachment remains in full force. No other officer could attach the property on a writ against Davis and take it out of the possession of the defendant. The officer who made the attachment might make other attachments against Davis without a new seizure of the property. These principles are too well settled to require citation of authorities. The policy of the statute applies in all its force. It frequently occurs that an officer who attaches personal property cannot keep it in his actual possession all the time but must employ a servant for such purpose.

Can it be that the statute should be so construed that while the officer is present having the actual possession of the property a mortgagee cannot bring an action of replevin and take it from him without first giving the notice, but the moment he is obliged to leave it in the care of his servant the action may be brought and maintained against the servant without the notice? If so, it is quite easy to evade the statute. The statute should be liberally construed to effectuate its object. *Nichols v. Perry*, 58 Maine, 29. The action is virtually against the officer. It takes the property out of his possession, and cannot be maintained without the notice required by the statute.

Plaintiff nonsuit.

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

LOUISE R. WILLIAMS vs. THOMAS WILLIAMS.

Franklin. Opinion January 4, 1886.

Dower. Divorced wife. Demand. Co-tenants.

In order to enable a divorced wife to maintain against her former husband an action of dower in an undivided lot of real estate, it is not necessary that her demand for dower should be made upon the co-tenants of her husband.

A demand for dower is not vitiated because it embraced more land than was claimed in the demandant's writ in her action of dower.

The demandant's husband held lands by descent from his father whose widow was entitled to dower therein. After the demandant's action of dower as a divorced wife was commenced, the widow applied to the probate court to have her dower assigned. In proceedings duly had, her dower in all lands was set out and assigned to her in one of the parcels, without objection by her or by the heirs, and the assignment was accepted by the judge of probate. *Held*, that the assignment was valid and binding on the parties, and that it defeated the demandant's right to dower in that parcel.

ON REPORT.

Action of dower by a divorced wife against her former husband.

With respect to one of the parcels in which the plaintiff claimed dower the defendant said that he had conveyed his interest in the same to his mother and that the plaintiff had signed the deed, thereby relinquishing her right of dower in it. The deed did not purport to have been signed in the presence of any subscribing witness; nor was it acknowledged or recorded; and the plaintiff denied that she signed it. There did not seem to be any conflict in the evidence with respect to any other material fact; and, after the evidence was closed on both sides, the parties agreed that the jury should find whether or not the plaintiff signed the deed in question and then the whole case should be reported to the law court to render such judgment as the legal rights of the parties required. The jury found that the plaintiff did not sign that deed, and the defendant filed a motion addressed to the law court to have that finding of the jury set aside as against the weight of evidence.

Walton and Walton, for the plaintiff, cited: 1 Scribner, Dower, 327; 2 *Id.* 74; 1 Wash. R. P. 269, 270; 1 Greenl. Cr. R. P. 170; 1 Hilliard, R. P. 581; *Blossom v. Blossom*, 9 Allen, 254; 1 Co. Litt. 32, *b*.

Counsel contended that the assignment of dower in the ninth parcel to the defendant's mother was a defense gotten up simply to defeat this action; and that the assignment was not valid because the dower in several different parcels should have been set out separately in each lot and one whole lot could not be taken as and for her dower in all the parcels. *French v. Pratt*, 27 Maine, 381; *Jones v. Brewer*, 1 Pick. 314.

An assignment by probate court is only binding on those who consent. 2 Scribner, Dower, 71-82; *Barton v. Hinds*, 46 Maine, 124.

This plaintiff did not consent, and the consent by her divorced husband, after divorce, could not and ought not to affect her rights. 2 Scribner, Dower, 89, 334, 335; 1 Bright, Hus. and Wife, 352, 353, 366, 388; *Manning v. Laboree*, 33 Maine, 346.

H. L. Whitcomb, for the defendant.

The demand in this case was for dower in the whole of twenty-eight parcels of real estate. The writ as amended claimed dower in much less number of parcels and in an undivided fourth part. Such a demand was not good. *Ford v. Erskine*, 45 Maine, 484.

The demand should have been made on all the tenants of the freehold. R. S., c. 103, § § 16, 20; 1 Wash. R. P. (4 ed.), 199, 198.

This was a joint tenancy and no dower attached. 4 Kent's Com. 357; 2 Black. Com. 180.

Upon the question of the effect of the right to dower of the defendant's mother, counsel cited: *McLeery v. McLeery*, 65 Maine, 172; *Cregier v. Case*, 1 Barb. Ch. R. 598 (45 Am. Dec. 416); *Safford v. Safford*, 7 Paige, Ch. R. 259 (32 Am. Dec. 633); *Eldredge v. Forrestal*, 7 Mass. 253; *Brooks v. Everett*, 13 Allen, 457; *French v. Pratt*, 27 Maine, 381;

French v. Peters, 33 Maine, 396; *Larrabee v. Lumbert*, 36 Maine, 441.

LIBBEY, J. The demandant brings this action as the divorced wife of the tenant to recover her dower in thirteen parcels of land of which she alleges he was seized during coverture.

The tenant objects to the maintenance of the action for want of a sufficient demand. It is claimed that the demand is insufficient because it is a demand of dower in an undivided share of the lands owned by the tenant in common with others and no demand was made on his co-tenants. The statute does not require it. The demand must be made upon the person who is seized of the freehold. The demandant does not seek to recover her dower in the whole of the lands, but in the undivided share of the tenant. He is tenant of the freehold of such share. His co-tenants are not seized of his share as tenants of the freehold. They have no interest in the demandant's claim and no demand on them is required. It is further claimed that the demand was of her dower in the whole of the lands described while in her writ she claims dower in an undivided share only. This objection is not tenable. *Hamblin v. Bank of Cumberland*, 19 Maine, 66.

The contention between the parties relates to the demandant's right to dower in the first and ninth parcels described in her writ. There appears to be no controversy in regard to her right to dower in the other parcels; as to the ninth parcel, the homestead of Thomas Williams, deceased father of the tenant, we do not think the demandant dowable. The tenant inherited one-fourth of this, and most of the other parcels described as one of the heirs of his father, who died leaving a widow, Sally G. Williams, and four children. Sally G. Williams had a right to dower in the lands of her deceased husband. The estate taken by the children was subject to that right; and hence the demandant's right to dower is subject to the right to dower of the senior widow. After this action was commenced Sally G. Williams presented her petition to the probate court to have her dower in the lands of which her husband died seized, set out and assigned to her; and upon proceedings duly had therefor

the homestead was set out to her by the commissioners as her dower in all of said lands. The report of the commissioners was accepted and her dower was assigned by the court accordingly. This assignment was in conformity with one of the modes of assigning dower, as between the widow and heirs, recognized by the law of this state and is conclusive upon the parties. *French v. Pratt*, 27 Maine, 381; *French v. Peters*, 33 Maine, 396.

The land set out to her was land of which she was dowable, and by the assignment, her seizin by relation extends back to the death of her husband, and is a continuation of his seizure. The tenant then was never seized of one-fourth of this land during coverture so as to give the demandant right to dower in it. *McLeery v. McLeery*, 65 Maine, 172.

The evidence of the assignment of dower to the senior widow is admissible to disprove the allegation of the seizin of the tenant.

As to the first parcel, the saw mill, the tenant claims that the demandant is dowable of five-sixteenths only, on the ground that she joined with him in a deed of one undivided half thereof to Sally G. Williams, August 8, 1873, releasing her right to dower. The demandant denies the execution of that deed by her and this issue was tried to the jury who found for the demandant. The tenant claims that the verdict should be set aside as against the evidence. The evidence was conflicting and not very satisfactory, but the credibility of the witnesses and the weight that should be given to their testimony were for the jury to determine. Upon a careful examination of the evidence we do not think it preponderates so strongly in favor of the tenant as to justify the court in setting the verdict aside.

*Judgment for the demandant for her
dower in all the lands described
in her writ except the ninth parcel.*

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

BENJAMIN B. CLAY, assignee, vs. ELISHA TOWLE.

Kennebec. Opinion January 8, 1886.

*Equity practice. Insolvency. Creditors' petition. New creditor joining.**Preference. Corporation. Director. Mortgage.*

An answer upon oath, to a bill in equity, that does not call for answer upon oath, does not operate as evidence of the facts stated in it.

An unsecured creditor may join in a creditor's petition against an insolvent debtor at any time while the same is pending.

Upon such petition an adjudication of insolvency takes effect from the date when the petition was filed, and the validity of all transfers of property by the debtor is to be determined with reference to that date.

It is the duty of a director to know the financial condition of his corporation, and he cannot avail himself of any dereliction of such duty to secure a personal advantage over other creditors of the corporation.

A mortgage given by an insolvent corporation to secure an existing debt, with intent to give a preference to a creditor, having reason to believe that the corporation was insolvent, and that a preference was intended in fraud of the insolvent law, made within four months of the filing of the insolvency petition, is void, and will be so declared by courts of equity. A mortgage for a loan made at the time, given by an insolvent corporation, in the absence of fraud is valid.

The case is stated in the opinion.

The report shows that the mortgages referred to in the opinion, were given January 23, 1884, and January 24, 1884, that the petition in insolvency was filed May 21, 1884, that four creditors were allowed by the insolvent court on June 9, 1884, on motion, to join in the creditors' petition, and on June 23, 1884, on motion, four other creditors were allowed to join in that petition. Other material facts are stated in the opinion.

Clay and Clay, for the plaintiff, cited: R. S., c. 70, § 52; *Bingham v. Frost*, 6 B. R. 130; *Merrill v. McLaughlin*, 75 Maine, 64; *In re Hawkes*, 70 Maine, 213; *In re Roberts*, 71 Maine, 390; *Bump, Bankruptcy*, 417, 418, 454, 817-819; *In re Duncan*, 14 B. R. 18; *Forbes v. Howe*, 102 Mass. 427; *In re Silverman*, 4 B. R. 523; *Farrin v. Crawford*, 2 B. R. 602; *Wager v. Hall*, 5 B. R. 181; *Forbes v. Marr*, 3 B. R.

78	86
86	474
78	86
84	506
94	507

602; *Bump*, *Fraudulent Conveyances*, 574; *In re Wells*, 3 B. R. 371; *In re Craft*, 1 B. R. 378; *In re Waite*, 1 Lowell, 407; *Oxford Iron Co. v. Slafter*, 14 B. R. 380; *Toof v. Martin*, 6 B. R. 488; *Farrin v. Crawford*, 2 B. R. 602; *In re Drummond*, 1 B. R. 231; *Ecfort v. Greely*, 6 B. R. 433; *Curtis v. Leavitt*, 15 N. Y. 9; 17 Barb. 309; *Smith v. Moore*, 2 Cal. 524.

Baker, Baker and Cornish and *A. M. Spear*, for the defendant, contended, that in order to give the court of insolvency jurisdiction in a case of involuntary insolvency it must appear that the creditors signing hold one-fourth of the provable debts.

The court may undoubtedly allow amendments and permit new creditors to sign. *In re Hawkes*, 70 Maine, 215; *In re Roberts*, 71 Maine, 393; *Foster v. Goulding*, 9 Gray, 50.

And such an amendment ordinarily relates back by fiction of law to the date of the original petition. But this relation back cannot prevail to destroy our vested and intervening rights secured by our superior diligence. If there was no legal petition in insolvency prior to May 24, 1884, then the defendant's title under both mortgages became perfect by the lapse of four months and any subsequent action by any of the other creditors could not take away that title.

We submit that this principle, that no amendment by the fiction of relation back can affect a third party or an intervening right, is well grounded in the law and of general application. See *Malone v. Samuel*, 13 Am. Dec. 180, note; *Emerson v. Upton* 9 Pick. 167; *Ohio Co. v. Urbana Co.* 13 Ohio, 220; *Banister v. Higginson*, 15 Maine, 77; *Means v. Osgood*, 7 Maine, 149; *Whittier v. Vaughan*, 27 Maine, 301; *Williams v. Brackett*, 8 Mass. 240; *Harmon v. Magee*, 57 Miss. 410; *Jordan v. Corey*, 52 Am. Dec. 520, note; *Purcell v. McFarland*, 1 Ired. Law, 34 (35 Am. Dec. 734, note); *Tidd*, § § 986, 1027; *Seawell v. Bank*, 3 Dev. 284; *Milliken v. Bailey*, 61 Maine, 316; *Haven v. Snow*, 14 Pick. 33; *Dennis v. Clark*, 2 Cush. 347; 61 Am. Dec. 125, note; *Wood v. Denny*, 7 Gray, 542; *Denny v. Ward*, 3 Pick. 199; *Moulton v. Chapin*, 28 Maine,

505; *Whittier v. Varney*, 10 N. H. 291; *Fairfield v. Paine*, 23 Maine, 498; *Knight v. Taylor*, 67 Maine, 594; *Drew v. Bank*, 55 Maine, 452; 2 Pom. Eq. § 637 and cases; *Chase v. Denny*, 130 Mass. 568; *In re Hubbard*, 1 Law M. 190.

Counsel further contended, in an able argument, that the insolvent corporation was not insolvent at the time the mortgages were given, *i. e.* that the assets of the company at that time exceeded the liabilities (not including the capital stock), and that the defendant had no reason to believe the corporation insolvent, or that a fraudulent preference under the insolvent law was intended by the mortgages.

HASKELL, J. Bill in equity, by assignee of an insolvent debtor, seeking to annul mortgages given to a creditor, as a preference in fraud of the insolvent law. The cause is reported, to be heard on bill, answer and proofs. The bill does not call for answer upon oath, and the answer, although verified by oath, does not operate as evidence, even as to the facts stated in it, responsive to the bill; but like ordinary pleadings, points out the issues to be determined by evidence. R. S., c. 77, sec. 15.

The bill avers the proper adjudication and the regular appointment of the assignee by the insolvent court. The answer denies both. The burden is upon the orator to prove the allegations of his bill. To do this, he produces the records of the insolvent court and the original papers on file in the case. These show an involuntary petition, not supported by the requisite number of creditors, in which other creditors, sufficient to complete the necessary quorum, were allowed to join, against the objection of the debtor, upon which the adjudication of insolvency was entered, and a regular choice and appointment of the orator assignee.

A creditors' petition against an insolvent debtor is in the nature of a bill in equity, brought for the benefit of all in like interest. At any time, while pending, an unsecured creditor may join in it, and aid its prosecution. *Re Hawkes*, 70 Maine, 213. The adjudication takes effect from the date when the petition was filed, and the validity of all transfers of property, by the

debtor, is to be determined with reference to that date. *Re Roberts*, 71 Maine, 390. The insolvency proceedings are valid, and take effect from the time the original petition was filed.

The debtor gave two mortgages of its real estate, alleged to be a preference to the respondent, in fraud of the insolvent law; one bears date January 23, 1884, and is conditioned to secure the payment of four thousand dollars; the other is dated the next day, and is conditioned to secure the payment of three thousand dollars. The respondent was a director of the corporation at the time when he received these mortgages from it. The evidence clearly proves the insolvency of the corporation at the time these mortgages were given. It was unable to meet its maturing demands in the ordinary course of business. *Lee v. Kilburn*, 3 Gray, 594; *Toof v. Martin*, 13 Wallace, 40.

The respondent was a director. His duty required, that he should know the financial standing of the corporation, and he is presumed to have performed it. If he has been recreant in guarding the interests intrusted to his care, he cannot be allowed to set up such dereliction of duty to his own profit and advantage over other creditors, who had a right to rely upon his judicious action, and discreet management, for the equal benefit of all interested in the affairs of the corporation. *European & North American Railway Co. v. Poor*, 59 Maine, 277; *Bradley v. Farwell*, 1 Holmes, 433; *Coons et als. v. Torne et als.* 9 Fed. Rep. 533; *Koehler v. B. R. F. Iron Co.* 2 Black, 715; *Twin Lick Oil Co. v. Marbury*, 1 Otto, 587; *Imperial Mercantile Credit Association v. Coleman*, 6 (L. R.) Ch. 558.

This branch of the case might well rest upon these wholesome rules of law, but the artful method, contrived to blind the eyes of justice, in making these mortgages appear *bona fide*, and to have been given for a present consideration, demonstrates the fact, that a preference was intended, by both parties, in fraud of the insolvent law.

The respondent held demand notes of the corporation, more than six months old, amounting to about four thousand dollars. On the 22d of January, 1884, he called upon the president of the corporation to pay them; the president, thereupon, not having

sufficient funds of the corporation at his command, gave the respondent his personal note, for the amount of the demand notes of the corporation that the respondent held, payable in thirty-seven days to the respondent's order, and received in exchange, the demand notes held by the respondent. The next day, January 23, the respondent surrendered to the president of the corporation the time note he had given the day before to the respondent and received in exchange for it corporation notes, on time, aggregating four thousand dollars, and a mortgage of the real estate of the corporation, to secure their payment. The president then destroyed his personal note given to the respondent the preceding day, and surrendered to the corporation its original demand notes, that the respondent had transferred to him.

The effect of this roundabout contrivance was, to give the respondent a mortgage, to secure his debt against the corporation. No money was passed between the parties, save a few dollars to make an even four thousand dollars. If the purpose had not been fraudulent, but only an intention by a solvent debtor to secure a creditor, and thereby change a "floating debt" into a permanent loan for a specific time, which might have been a prudent operation, why this strange transaction? Why was a plain straightforward method avoided? If no fraud had been intended, and the corporation was solvent, it would have not violated the insolvent law in securing its debtor, by the usual method of business.

It is quite plain, that the four thousand dollar mortgage was given, and received, to secure a pre-existing debt, in fraud of the insolvent law, and should be adjudged invalid and decreed to be cancelled and surrendered to the orator; but the notes, as evidence of his debt, the respondent may retain.

The next day, January 24, the respondent loaned the corporation three thousand dollars, and took a second mortgage to secure the payment of it. This loan was used to meet the pay roll and other current bills due from the corporation. Its manifest purpose was, to put the corporation in funds to meet pressing liabilities, and thereby enable it to survive its insol-

veney, possibly until the respondent's first mortgage should become old enough to withstand the insolvent law.

The bill seeks the cancellation of this mortgage, because it is a preference; but the proofs show the reverse; and because it was given to hinder and delay creditors; but the averments in the bill are too meagre and vague to warrant relief for such reason. Touching this mortgage the orator is entitled to no relief.

Bill sustained with costs. Decree according to this opinion.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

DANIEL TYLER in error, vs. ABIEL W. ERSKINE.

Waldo. Opinion January 8, 1886.

Writs of error. Record. Practice.

Writs of error lie only for the correction of such defects as are apparent from inspection of the record, a transcript of which should be produced at the trial.

A party, desiring to reverse a judgment for error, should require the clerk to complete and attest his record, that he may produce a transcript of it at the trial, and until this is done such party is not entitled to relief by writ of error.

Hiram Bliss, Jr., for the plaintiff.

George E. Wallace, for the defendant.

HASKELL, J. Writ of error to reverse a judgment of this court for error in law. Plea, *nullo est erratum*. The presiding justice found no error, and the case is here on exception.

This writ lies to such defects as are apparent from inspection of the record, a certified transcript of which should be exhibited at the trial. No such transcript is here produced. The plaintiff shows only copies of original papers and docket memoranda, from which a record is to be made. Until that is done, it can not be known whether any error exists. *Wood v. Leach*, 69 Maine, 555.

A party desiring to reverse a judgment for error, should require the clerk to complete and attest his record, and until

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this is done the plaintiff is not entitled to relief in an action of this kind. *Rockland Water Co. v. Pillsbury*, 60 Maine, 425; *McArthur v. Starrett*, 43 Maine, 345; *Denison v. The Portland Co.* 60 Maine, 519; *Valentine v. Norton*, 30 Maine, 194; *Starbird v. Eaton*, 42 Maine, 569; *Paul v. Hussey*, 35 Maine, 97; *Kirby v. Wood*, 16 Maine, 81; *Jewett v. Hodgdon*, 2 Maine, 335.

It would seem that if the plaintiff had exhibited a transcript of a record of a judgment against him on the writ of review, for the same amount of the original judgment with costs of review, that the same would be erroneous. The judgment in review did not vacate the original judgment, but that judgment should be affirmed, and execution should issue for costs of review only. R. S., c. 89; *Dyer v. Wilbur*, 48 Maine, 287; *Crehore v. Pike*, 47 Maine, 435.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.

STATE OF MAINE vs. KNOX AND LINCOLN RAILROAD COMPANY.

Knox. Opinion January 11, 1886.

Tax. Knox and Lincoln Railroad Company. Charters.

The Knox and Lincoln Railroad Company is exempt from taxes other than specified in its charter.

The charter of a railroad company provided that a portion of its net income should be paid to the state as a tax and that "no other tax, than herein is provided, shall be levied or assessed on said corporation, or any of their privileges, property or franchises." *Held*, that the company was not liable to taxation under statute 1881, c. 91.

On report on facts agreed.

Debt to recover the sum of six hundred and fifteen dollars and thirty-six cents, levied in 1881 by the governor and council under the provisions of stat. 1881, c. 91.

Orville D. Baker, attorney general, for the state.

Henry Ingalls, for the defendant.

HASKELL, J. Debt for a tax laid under c. 91 of the laws of 1881. The original charter, under which the defendant exists, was granted August 13, 1849, and after providing that a portion of its net income shall be paid to the state as a tax, further provides, that "no other tax than herein is provided, shall be levied, or assessed on said corporation, or any of their privileges, property, or franchises," and that the legislature shall have power to impose fines and penalties necessary more effectually to compel compliance with its charter, "but not to impose any other, or further duties, liabilities, or obligations." Sections 15 and 17. It was held in *State v. Dexter and Newport Railroad Co.* 69 Maine, 44, that the defendant, holding a charter in terms almost identical with the charter of defendant, was not amenable to a tax laid upon it, other than specified in its charter. That case must be held to be decisive of the case at bar.

Judgment for defendants.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

INHABITANTS OF KITTERY

vs.

PROPRIETORS OF PORTSMOUTH BRIDGE.

York. Opinion January 11, 1886.

Taxes. Portsmouth bridge.

The Portsmouth bridge is a toll-bridge across the Piscataqua river from Kittery, Maine, to Portsmouth, N. H. *Held*, that so much of the bridge as is within the town of Kittery is there taxable as real estate. *Held further*, that the defendant is a corporation and owner of the bridge.

On report of facts agreed.

The defendant is a toll-bridge corporation, incorporated in this State by act of the legislature, January 23, 1821 — if that act constitutes an act of incorporation, as plaintiffs claimed. The defendants claimed it was an act only to empower a New Hampshire corporation to exercise its franchise in Maine. The act was made a part of the case. Also, the acts of the legislatures

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74	93
86	77

of New Hampshire and Massachusetts, mentioned in the act of Maine.

Since 1841 the stock of the toll-bridge constructed by the defendant corporation, if it be such, has been and still is owned by the Eastern Railroad, a corporation in Massachusetts, and the P. S. & P. R. R., a corporation in Maine, in equal shares. Only one issue of stock was ever made; and this was made in New Hampshire, where the management, offices and seat of administration of said corporation have always been, its records always kept, and all its meetings required by its by-laws to be, and in fact, are held. No meeting was ever held in Maine.

In 1880 the defendant corporation held no estate or property in the town of Kittery, except its franchise and that part of its bridge which covered the Piscataqua river, between the shore end thereof and the New Hampshire line, situated in the town of Kittery. The bridge rests on piles and lands, at its easterly end, at and wholly within a public highway. There is no pier at the eastern or Kittery end of said bridge; but piers are erected at the two sides of the draw for the passage of vessels, and which are constructed in that half of the bridge situated in Maine, and in said town.

The tax which the plaintiff town seeks to recover was assessed upon that portion of the Portsmouth toll-bridge situated in the limits of the State of Maine, being in the town of Kittery aforesaid, for the year 1880, by the assessors of said town.

J. M. Goodwin, for the plaintiffs, cited: *Green's Brice's Ultra Vires*, Appendix IV., p. 276; *Galveston Railroad v. Cowdrey*, 11 Wall. 476; *Arms v. Conant*, 36 Vt. 745; R. S., c. 6, § 2; R. S., c. 1, § 6, Art. X; *People v. Cassity*, 46 N. Y., 46; *New Haven v. Fair Haven, etc., R. R. Co.*, 38 Conn. 422, cited in "Cooly on Taxation," p. 274; R. S., 1871, c. 6, § 14, Article 2; *Portland, Saco & Portsmouth R. R. Co. v. City of Saco*, 60 Maine, 196; *Cumberland Maine Railway v. City of Portland*, 37 Maine, 444.

George C. Yeaton, for the defendants.

Every corporation has its domicile in the state of its origin,

beyond which it has no legal existence. "It must dwell in the place of its creation." *Bank of Augusta v. Earle*, 13 Pet. 579; *Marshall v. B. & O. R. R.* 16 How. 314; *Day v. Newark Rubber Co.* 1 Blatch. 628; *Miller v. Ewer*, 27 Maine, 509.

The domicile of the proprietors of Portsmouth Bridge was in New Hampshire. *Vide* act of New Hampshire approved January 28, 1819. The act of Maine, approved January 23, 1821, did not intend to create a new corporation in Maine, but to license and empower an existing New Hampshire corporation to exercise its franchise in Maine.

For one corporation from the joint paternity of two different States legislatures there cannot be. *Farnham v. Blackstone Canal Co.* 1 Sum. 47; *Quincy R. R. Bridge Co. v. County of Adams*, 88 Ill. 615; *Ohio and Miss. R. R. Co. v. Wheeler*, 1 Black. 286; *R. R. Co. v. Harris*, 12 Wall. 65; *Blackstone Mfg. Co. v. Inhts. of Blackstone*, 13 Gray, 488; *Miller v. Ewer*, *supra*; *Freeman v. Machias Water Power Co.* 38 Maine, 343; *Angell and Ames Corp.* 164; *Morawetz Priv. Corp.* 527 *et seq.* Much of the reasoning of the court in *Walsh, Appts. v. The Trustees of the New York and Brooklyn Bridge*, 96 N. Y. 427, 435, is directly in point; *Granger's Life and Health Ins. Co. v. Kemper*, 73 Ala. 345; *Thompson v. Waters*, 25 Mich. 214, 221; *Freeman v. Machias Water Power Co.* *supra*; 2 Field's Lawyers' Briefs, 164; Green's Brice's *Ultra Vires* (2d ed.), 442, note (a).

Since 1821, for sixty-four years, the only office of the corporation has been, all its meetings have always been held, and its record always kept, in New Hampshire. If it were doubtful under its organic acts where its domicile is, it would be held to be in New Hampshire by virtue of these facts. *Orange and Alexandria R. R. Co. v. City Council of Alexandria*, 17 Grat. 176; *Quincy R. R. Bridge Co. v. County of Adams*, 88 Ill. 615, 621; *Thom v. Central R. R. Co.* 2 Dutch (26 N. J. L.), 121; *Culbertsen v. Wabash Nav. Co.* 4 McLain, 544; Rap. & Lawr. Law Dic. Tit. "Domicile." *Eastern Del. Bridge Co. v. Metz.* 32 N. J. L. 199; *Goshorn v. Supervisors Ohio Co.* 1. W. V.

308; *City of St. Louis v. Wiggins Ferry Co.* 40 Mo. 580; *R. R. Co. v. Vance*, 96 N. S. 450.

Revised Statute (1871), c. 6, § 16, provides that "the stock of all toll bridges shall be taxed as personal property to the owners thereof, in the towns where they reside."

(1.) Section 19 provides for assessing the property in event of a failure to make returns required by section 21, chap. 46. (The latter provision, of course, applies only to domestic corporations.) The two sections, construed together, plainly negative the legislative intent to tax both stock and property in any case, except those specifically mentioned.

For the provisions of section 19, applying only in cases when a duty has been neglected, and not when it has been performed, must be wholly without effect if it prescribe a mode of taxation in a single class of cases which is also applicable to all cases. None but a construction in violent opposition to all familiar rules could admit of this conclusion.

(2.) But again, if the phraseology were not so pointed, the double taxation which ensues, if in all cases the property may be taxed, as well as the stock, is never presumed to be intended by the legislature. If the power to impose double taxation be conceded, nothing short of a clearly expressed intent to exercise such power will suffice to warrant a court in thus interpreting statutes. Here is not merely an entire absence of any words evincing such intent, but the words actually used in both sections 16 and 19, cannot be given full effect consistently with the theory of any such legislative intent. *Augusta Bank v. Augusta*, 36 Maine, 259; *Cooley on Taxation*, 164, 165; *City and County of San Francisco, Appls. v. Spring Valley Water Works*, 63 Cal. 524.

Defendant corporation held no real estate in Maine; it owned no land at all; its bridge occupied no land in Maine, excepting only such as its easterly end landed upon, on the bank of the river, which was wholly within the limits of, and a part of the public highway. The State of Maine owned the land — unless a portion of it were flats — to the middle of the river (*vide State v. Wagner*, 61 Maine, 178–190), and granted the privilege of erecting this bridge, by means of which defendant corporation

could enjoy the franchise it had. This privilege thus to land travellers it was authorized to receive tolls from in the public highway was in no sense to be regarded as real estate. The bridge (that is, whatever of it was in Maine) stood upon no land owned by the corporation; its only value was as incidental to the franchise itself — one of the means of utilizing which it was. It could not be separately sold apart from the franchise itself, and hence, as such, in itself, it was valueless. This is the reasoning of C. J. SHAW in *Central Bridge Co. v. Lowell*, 15 Gray, 106.

HASKELL, J. Debt for a tax assessed by the town of Kittery upon that part of Portsmouth toll bridge situated within that town. The defendant is a corporation and the owner of the bridge. No question is made as to the regularity of the tax nor as to the sufficiency of the demand before suit.

Revised Statutes, 1871, c. 6, sec. 3, in force when this tax was laid, provides, that "real estate for the purposes of taxation. . . shall include all lands in this state and all buildings and other things erected on, or affixed to the same." Ch. 1, sec. 4, rule X; provides, that "the words 'land or lands,' and the words 'real estate,' include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein."

By these rules, that part of the bridge within the town of Kittery is there taxable as real estate. *Hall v. Benton*, 69 Maine, 346; R. S., c. 6, § 14, p. 111.

Defendant defaulted.

PETERS, C. J., WALTON, VIRGIN, LIBBEY, and FOSTER, JJ., concurred.

FRED S. MERRILL vs. WESTERN UNION TELEGRAPH COMPANY.

Androscoggin. Opinion January 19, 1886.

Telegraph companies. Defeasible contracts. Damages.

A verbal contract that the plaintiff should labor for a manufacturer at two dollars and twenty-five cents per day, commencing Monday, September 1st, but for no stipulated period, is defeasible at the will of either party, and a telegraph company is liable, for nominal damages only, in not delivering a

telegram to the plaintiff, seasonably notifying him of the terms of the contract, whereby he lost all benefit from it.

ON report of facts agreed.

Action on the case for negligence of the defendant company in not delivering a telegraph dispatch to plaintiff, alleging special damage. The writ was dated December 18, 1884. The essential facts are stated in the opinion.

Savage and Oakes, for the plaintiff.

The plaintiff had entered into a legal contract. Had he presented himself Monday, September 1, 1884, at the shop of the man who had agreed to employ him and been refused employment, is there any doubt that he could have recovered damages for the failure?

The contract for future employment for an indefinite time is recognized as a legal contract in various cases. It has a value. It is assignable. 7 Met. 335; 5 Gray, 49-50. Undoubtedly an assignment of such a contract, or the wages to be earned under it, would be a valid consideration for a promise by the assignee. By reason of the negligence of the defendant, therefore, the plaintiff lost a contract of value to him, one for the breach of which he could have recovered compensation, the profits of which he could sell before he had performed the work.

The damage was the direct consequence of the defendant's negligence, as directly the consequence as was the damage in the cases, *True v. International Tel. Co.* 60 Maine, 9, and *Bartlett v. West. Un. Tel. Co.* 62 Maine, 209. In those cases there was loss of an opportunity to take advantage of a market and purchase at low prices. In this, a loss of an opportunity to fulfil a contract.

It will of course be argued in defense that the damage was only nominal since the contract was not for a fixed time and might possibly have been terminated the very day plaintiff commenced work.

One of the leading cases on the question of damages for loss by reason of breach of contract is *Masterton v. Mayor of Brooklyn*, 7 Hill, 61. In this case it is held that a right to

damages equivalent to the profits to be earned by the faithful execution of a fair contract, results directly and immediately from the act of the party who prevents the contract from being performed. 42 Am. Dec. 38; 7 Cush. 523; 115 Mass. 298.

In case of wrongful attachment of property whereby the business of a firm was injured, damages for loss of probable profits were allowed. 13 Ala. 160; 48 Am. Dec. 59. So in an action by a physician for damages, he was allowed to show as elements of damage the nature of his business, and its extent, and the compensation usually paid to persons doing such business for others. 41 Am. Rep. 21.

The plaintiff, by reason of losing this contract, was altogether out of employment until November 17, 1884, a space of seventy-seven days, and from that time till February 17, 1885, a space of ninety-two days, was employed at the rate of one dollar and twenty-five cents a day.

Baker, Baker and Cornish, for the defendant, cited: *Miller v. Mariner's Church*, 7 Maine, 51; *Hadley v. Baxendale*, 9 Exch. 341; *Squire v. Western Union Tel. Co.* 98 Mass. 232; *Western Union Tel. Co. v. Graham*, 1 Col. 230; *Leonard v. Telegraph Co.* 41 N. Y. 544; *Hamlin v. G. N. Ry.* 1 H. and N. 408; *Lane v. Montreal Tel. Co.* 7 Up. Can. C. P. 23; *Reliance Lumber Co. v. Tel. Co.* 58 Tex. 394; *1st Nat'l Bank v. Tel. Co.* 30 Ohio St. 555; *Berry v. Dwinel*, 44 Maine, 255; *Ripley v. Mosely*, 57 Maine, 76; *True v. Int. Tel. Co.* 60 Maine, 9; *Gray*, Communication by Tel, § 82; *Melchert v. Am. Un. Tel. Co.* 11 Fed. Rep. 193; *Kinghorne v. Montreal Tel. Co.* 18 Up. Can. Q. B. 60; *Beaupre v. Pacific Tel. Co.* 21 Minn. 155; 2 Thompson, Neg. 853; *Western Union Tel. Co. v. Connelly*, Chicago Leg. News, March 29, 1884; *Blaisdell v. Lewis*, 32 Maine, 515; *Griffin v. Colver*, 16 N. Y. 489.

HASKELL, J. Damages are sought for the inexcusable non-delivery of a telegram, whereby the plaintiff was prevented from performing his contract to labor.

The plaintiff's agent completed a verbal contract, that the plaintiff should labor for a manufacturer at two dollars and

twenty-five cents per day, commencing Monday, September 1, and seasonably required the defendant to transmit a message to the plaintiff, notifying him of its terms. The message was not delivered in season for the plaintiff to begin his work as stipulated, and thereby he lost his employment. The defendant denies liability beyond nominal damages.

The contract was defeasible at the will of either party. How then, can any substantial damage be measured? Had the engagement to employ the plaintiff been for a stipulated and definite period, not over one year, the plaintiff would have a right to demand damages that could be definitely measured and assessed. He would then have been entitled to enjoy the fruit of his labor during the time of his engagement; but under the terms of the contract in proof, he was liable to be dismissed from his employment as soon as he had entered upon it, and it can not be known what damages he has suffered in the premises. The plaintiff must prove his damages before they can be assessed. The case fails to show facts that warrant greater than nominal damages. *Miller v. Mariner's Church*, 7 Maine, 51; *Blaisdell v. Lewis*, 32 Maine, 515; *True v. Int. Tel. Co.* 60 Maine, 9; *Griffin v. Colver*, 16 N. Y. 489.

Defendant defaulted for one dollar.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

STATE OF MAINE, by certiorari *ex rel.*, INHABITANTS OF HARPSWELL

vs.

COUNTY COMMISSIONERS OF CUMBERLAND COUNTY.

Cumberland. Opinion January 19, 1886.

County commissioners of Cumberland, sessions of. R. S., c. 18, § 5, and c. 78, § 6.

All reports which the commissioners of Cumberland county are required to make at a "regular session" must be made at a "term of record" holden on the first Tuesday of January or June, and all continuances required by law are to be to the next "term of record."

The words "regular session" in R. S., c. 78, § 6, are not identical in meaning with the same words in R. S., c. 18, § 5.

ON REPORT.

Certiorari. The writ alleges that the county commissioners of Cumberland laid out a way in Harpswell, on a petition filed the first Tuesday of June, 1883, on which notice was given and hearing was had on the first day of August, same year; and that their return of the laying out was made at the session of their court, holden on the first Tuesday of January, 1884.

Strout and Holmes, for the inhabitants of Harpswell.

The provisions for the location of a town way and for applications to the county commissioners in case a petition to the municipal officers should not be successful, are found in R. S., c. 18, § 23, of the former statutes, § 19 of the latter, and the provision is "that when the municipal officers unreasonably neglect or refuse to lay out or alter a town way . . . the petitioner may present a petition stating the facts to the commissioners of the county at a regular session, who are to give notice thereof to all interested, and act thereon as is provided respecting highways." These proceedings are regulated by § 5 of the same chapter, 18, in both statutes, which says "their return made at the next regular session after the hearing is to be placed on file, and to remain in the custody of their clerk for inspection."

The provisions as to the regular sessions of the court of county commissioners for the county of Cumberland, are found in the Revised Statutes, c. 78, § 6, and the portion applicable is as follows: "Sec. 6. They shall hold annual sessions in the shire town of each county at the times following. . . . Cumberland, terms of record first Tuesday of January and June, and regular sessions on the first Tuesday of each month."

It is too well established to be questioned now that a report of the county commissioners locating a highway which ought to be made at any particular regular session, can not be carried over and returned, either to an adjournment of that regular session, or to any subsequent regular session. *Parsonsfeld v. Lord*, 23 Maine, 511.

Nor can it be made returnable before the next session. *Montecello v. Co. Com'rs*, 59 Maine, 391.

The same principle is applied to reports of committees appointed on appeal from the decision of the commissioners under a similar provision. *In re Windham*, petr.32 Maine, 452; *In re City of Belfast*, appt. 53 Maine, 431.

The time for the report to be made is fixed by statute by c. 18, § 5, as the next regular session. There was a regular session upon the first Tuesday of every month, including the month in which the hearing was had. The commissioners, in making their report, passed over that and the four subsequent regular sessions, making their return to the fifth regular session after the hearing.

This is the obvious result of the statute for whatever purpose it was enacted. The language of the act of 1883 being "regular session," it becomes immaterial whether the words "term of record," which were then introduced into the statute for the first time, mean the same as "regular session" or not, both because the term was made to coincide with the day of a regular session, and also because whether that were a regular session or not it was not the next one after a hearing was had.

C. W. Larrabee, for the defendants.

HASKELL, J. Certiorari, to quash the record of the county commissioners for the county of Cumberland, because they did not make and file their report for the location of a way at their next regular session after the hearing.

By the act of 1862, c. 65, § 2, incorporated into the revision of 1871, c. 78, § 6, the county commissioners for Cumberland were required to hold "annual sessions" on the first Tuesdays of January and June.

By the act of 1883, R. S., c. 78, § 6, they are required to hold "annual sessions," viz.: Terms of record on the first Tuesdays of January and June, and regular sessions on the first Tuesdays of each month. That is, terms of record twice yearly, with sessions thereof monthly, to be held regularly on the first Tuesday of each month. Prior to this act, the commissioners might adjourn their half yearly terms from time to time at their

pleasure, but the legislature has enacted that those terms shall be held on stated days throughout the year, that persons having business touching county affairs may know when its commissioners can be found in session. The monthly meetings are but sessions of the term in which they fall, and the business transacted at any session is at and during the term of record within which it is held, precisely, in legal effect, as though it had been done at an adjourned session of the half yearly term under the prior statute. The monthly sessions, after the beginning of a term of record, are, in effect, statute adjournments of that term. The duties of the commissioners and the methods of their procedure have not been changed by the act of 1883.

All reports that they are required by law to make at a "regular session," are to be made at a term of record, and all continuances required by law are to be to the next "term of record." It is clear, from a careful consideration of all the statutes touching the court of county commissioners and its duties, that the words "terms of record," in the act of 1883, have the same significance and are synonymous with the words "regular session" in c. 18, § 5, of the revisions of 1871 and 1883, and that these latter words in c. 78, § 6, of the revision of 1883, were inaptly used in contrast with the former.

In this view, the record sent up shows that the commissioners have proceeded regularly, and in accordance with law, and therefore the order is,

Record affirmed with costs.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

ABIEL TRASK vs. WILLIAM TRASK, administrator.

Lincoln. Opinion January 19, 1886.

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95	196

Real action. Death of defendant. Citation of interested persons. R. S., c. 104, § 16. Costs.

When the defendant in a real action to recover land dies, a citation to all persons interested in the estate of the deceased tenant, without naming any one, is not sufficient to authorize the court to enter judgment for the land.

A judgment for costs in such action against the estate in the hands of the administrator, can only be entered when the demandant has judgment for the land, and is incident thereto.

ON EXCEPTIONS.

The case and material facts are sufficiently stated in the opinion.

A. P. Gould, for the plaintiff.

The notice, ordered by the court to all persons interested in the estate of the deceased defendant, was served according to the order and proof of service was entered on the docket.

The demandant was entitled to recover judgment against the heirs upon such notice "whether they appeared and defended or not; and such judgment is conclusive on them." R. S., c. 104, § 18; *Bridgham v. Prince*, 33 Maine, 174.

Hilton and Huston, for the defendant.

HASKELL, J. Writ of entry to recover land and damages for waste. The action was referred, and thereafterwards the tenant died. His administrator was cited to defend, and he appeared. All persons interested in the estate of the tenant were also, by public notice agreeable to an order entered in vacation, cited to appear and defend, but none appeared. The referee heard the parties and reported, that the demandant should have judgment for the land and damages and costs. The court accepted the report, and the defendant has exception.

No person beside the administrator has appeared to defend the suit, and he is not charged with being a disseizor, nor does he pretend to be tenant of the freehold. Judgment against him could not affect the heirs. *Bridgham v. Prince*, 33 Maine, 174. There are no defendants in court against whom judgment can be given for the land. Had the demandant cited by name such persons as he conceived to be heirs of the deceased tenant; they would be concluded by default, if they did not choose to appear and defend, and judgment might be given against them for the land; but this has not been done. At common law, an action of this sort would abate upon the death of the tenant,

but by R. S., c. 104, sec. 16, it may be further prosecuted upon notice to "all interested in the estate." That is, notice to the individuals interested, served as the court may order. Upon their appearance, they may set up title in themselves, acquired either from the deceased tenant, or from any other source. *Brunswick Savings Institution v. Crossman*, 76 Maine, 577.

How then can judgment be awarded upon the report of the referee? The judgment must follow the terms of the report, and that awards the land as well as damages, and damages are only recoverable against the estate in the hands of the administrator, and then as incident to judgment for the land, for if the demandant had no title, he could neither recover the land, nor damages. The demandant must cite the heirs before he can further prosecute his suit.

Exceptions sustained. Report rejected.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

CITY OF BIDDEFORD

vs.

COUNTY COMMISSIONERS OF YORK COUNTY.

York. Opinion January 19, 1886.

City Council of Biddeford. Ways. Appeal. Certiorari. R. S., c. 18, § 19.
No appeal lies to the county commissioners of York county, from the refusal of the city council of the city of Biddeford to locate and lay out a city street. Where the city council have exclusive authority under the charter to lay out new streets and ways, the action of such council in refusing to lay out a way can not be reviewed or revised by the county commissioners under the provisions of R. S., c. 18, § 19.

ON REPORT.

The opinion states the case.

N. B. Walker, city solicitor, for the plaintiff.

No appearance at law court for the defendants.

HASKELL, J. Petition for certiorari, to quash the record of the county commissioners for the county of York, for want of jurisdiction.

The city council of Biddeford refused to locate and lay out a street in the city of Biddeford, and the commissioners, on application, proceeded to locate and lay out the same. R. S., c. 18, sec. 19, provides that "when the municipal officers unreasonably neglect or refuse to lay out, or alter, a town way," the commissioners, upon proper application, may determine the matter. They have jurisdiction only when given by statute. *Belfast v. Co. Com. of Waldo County*, 52 Maine, 529.

The city charter of Biddeford, special laws of 1855, amended by special act of 1860, c. 383, sec. 2, provides, that the city council "shall have exclusive power to lay out any new street, or public way, in said city, . . . and shall be governed by the same rules and regulations, as are by law provided in the case of the location, or discontinuance of town ways by the selectmen of towns." An appeal from its award of damages is provided for by the charter, and the commissioners are authorized to lay out county roads, that shall pass into, or through, the city. The charter confers upon the city council the same powers, that the inhabitants and municipal officers of towns enjoy. *Preble v. Portland*, 45 Maine, 241. The municipal officers of a city are the mayor and aldermen. R. S., c. 1, sec. 6, rule XXIII. The charter of Biddeford confers the power of laying out streets upon the city council, not upon its municipal officers, and in this behalf the authority is exclusive, save in the case of county roads passing through, or into the city; they may be laid out by the commissioners, *Hanson v. Biddeford*, 51 Maine, 193.

The true construction of the law is, that the council shall have exclusive and final authority over the laying out and altering of city streets. Its determination and action in such matters cannot be reviewed, or revised, by the county commissioners. This seems to have been conceded in *Baldwin v. Bangor*, 36 Maine, 518; *King v. Lewiston*, 70 Maine, 406. The general statutes do not in terms give an appeal to the commissioners of

the county from the action of the city council, and the charter of Biddeford expressly vests exclusive authority in such matters with its council. From its action an appeal lies only to the ballot.

Writ to issue.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

LEWISTON STEAM MILL COMPANY vs. A. R. MERRILL.

Same vs. GEORGE R. EASTER.

Same vs. CHRISTOPHER S. REED.

Same vs. LEWIS TUCKER.

Oxford. Opinion January 19, 1886.

*Writs of error. Record. Judgment. Practice. Declarations. Amendments.
Judgment in rem.*

An abbreviated record of a judgment in the Supreme Judicial Court that complies with the requirements of R. S., c. 79, § 11, is valid.

Writs of error for errors in law lie only for defects apparent upon the face of the record.

If there be error in law that would appear from an extended record, that either party desires to avail himself of upon a writ of error, he should before trial, require the clerk to make an extended record of the judgment sought to be reversed, (and if he refuses so to do, procure an order from the court directing such record to be made), and then present a transcript of such extended record, that the court may know from inspection of it whether an error exists.

Defects in a declaration that are proper subjects of amendment are cured by default and cannot be reached by writ of error.

A record that recites a command in the writ for the officer to attach certain specified logs upon which a lien is claimed, and the return of the officer that he did attach the same and put his mark upon them, and that, within five days thereafter, he filed in the clerk's office of the town where the logs lay the usual copy of his attachment, is sufficient to sustain a judgment *in rem* against the logs.

ON REPORT.

Writs of error. These four cases were argued together, the records of the judgments sought to be reversed were similar, the record in one case being as follows :

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86	371
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(Record.)

"State of Maine, Oxford, ss. — At the Supreme Judicial Court, begun and holden at Paris, within and for the county of Oxford, on the third Tuesday of September, being the eighteenth day of said month, Anno Domini, 1883.

By the Honorable WILLIAM WIRT VIRGIN, Justice.

No. 224. *Merrill v. Hodsdon and certain logs.*

"A. R. Merrill of Byron, in the county of Oxford, plaintiff, v. Gilbert T. Hodsdon of Byron, in the county of Oxford aforesaid, and certain spruce logs now on the bank of Swift River near the Alvarado O. Reed Mill (or the site where it formerly stood) in said town of Byron, being the same spruce logs cut and hauled by said Gilbert T. Hodsdon and owned by the Lewiston Steam Mill Company doing business at Lewiston in the county of Androscoggin, and said logs being marked W near the centre, and W at each end of all logs over twenty feet in length, defendants.

"In a plea of the case: For that the said defendant at said Byron, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of seventy dollars and fifty cents, according to the account annexed, then and there in consideration thereof promised the plaintiff to pay him the same on demand, which account, the plaintiff avers, is for labor by him performed in cutting and hauling said spruce logs, now on the bank of Swift River, near the Alvarado O. Reed mill (or the site where it formerly stood) in Byron aforesaid, under a contract with said defendant, said logs being marked W near the centre under twenty feet and W at each end of twenty feet and over, and that this suit is brought to enforce a lien for the above named sum, for said labor performed by him, the plaintiff, in cutting and hauling said spruce logs, and the last of which labor was performed within sixty days of the purchase of this writ and that this writ is made and suit brought to enforce the lien upon said logs, for said labor, in accordance with chapter 91, section 34 of the Revised Statutes of the State of Maine. Yet the said defendant, though requested, has not paid the same, but neglects and refuses so to do, to the damage of the said plaintiff, (as he

says) the sum of one hundred and fifty dollars, which shall then and there be made to appear, with other due damages.

"This writ was dated the twenty-first day of April, A. D., 1882, and the said logs attached on the twenty-second day of April, A. D., 1882, and service made on said defendant May nineteenth, A. D. 1882, as appears by the officer's return on said writ, viz. ;

"Oxford, ss : - April 22nd, 1882.

"At eight o'clock and thirty minutes in the forenoon, by virtue of the within writ I attached a chip as the property of the within named defendant, and I also attached three hundred and fourteen spruce logs, being the same described in said writ, now on the bank of Swift River, in the town of Byron, in the county of Oxford aforesaid, near the Alvarado O. Reed mill, (or the site where it formerly stood) in said Byron, said logs being marked A by me near the end, and the same logs that were before marked W near the centre on all under twenty feet in length, and W near each end on all twenty feet and over in length, valued at one hundred and fifty dollars, being the same logs I am within commanded to attach to enforce said lien for labor performed in cutting and hauling said logs, and within five days of said attachment, to wit, on Tuesday, April 25th, 1882, I filed in the office of the clerk of the town of Byron, aforesaid, an attested copy of so much of my return on this writ as relates to the above named attachment with the value of the property to be attached which I am within commanded to attach, the names of the parties, the date of the writ and the court to which the same is returnable.

William H. Tainter, deputy sheriff.

"Oxford, ss : - May 19th, 1882.

"I this day made service on the within named defendant by giving him a summons for his appearance at court.

William H. Tainter, deputy sheriff.

"This action was entered in this court at the September term, A. D. 1882, at which term the plaintiff appeared, but the personal defendant did not appear, and the plaintiff moved the court for notice of this suit to be given to the owner of said logs and thereupon the court ordered that the plaintiff give notice to the

owner of logs attached on said suit, by causing an abstract of said writ and this order thereon to be published three weeks successively in the *Oxford Democrat*, a paper printed in Paris, in said county, the last publication to be thirty days at least before the next term of said court, to be held at Paris, on the second Tuesday of March, A. D. 1883, and also cause the owner of the logs named in said writ, viz: The Lewiston Steam Mill Company, a corporation doing business at Lewiston, Maine, to be served with an abstract of said writ and this order thereon thirty days at least before said term of court to be held at Paris, on the second Tuesday of March, A. D. 1883, to the end that the said owner of said logs may then and there appear at said court, and be admitted to defend and become a party to said suit, if he shall see cause.

"This action was thence continued to the March term, A. D. 1883, of this court, at which term notice of this suit to the owner of said logs, as ordered, was proved to the satisfaction of the court, and said action was then continued to the September term of this court, A. D. 1883, when the plaintiff again appears, Messrs. Foster and Herrick appear for the log owners, but the personal defendant, though called to come into court does not appear, but makes default, and on the second day of said September term, the court order, that the defendant be defaulted, that the logs be defaulted, and judgment for lien on logs described in writ and return.

"It is therefore considered and adjudged by the court, that the said A. R. Merrill has a lien upon so many of said logs as were attached upon the original writ and described in said writ and return, for his personal labor in cutting and hauling the same, and that said A. R. Merrill recover judgment against the said Gilbert T. Hodsdon and said three hundred and fourteen spruce logs, marked W near the centre, and W at each end of all logs over twenty feet in length, being the same attached on and described in said writ, the sum of seventy-six dollars and fifty-three cents debt or damage, and costs of suit taxed at twenty-six dollars and fifty-one cents.

"Judgment rendered October 1st, A. D., 1883.

"Execution issued October 18th, A. D., 1883.

"And now on the twelfth day of the term, being the first day of October, A. D., 1883,

"It is ordered, That judgment be entered up in all matters where final action has been had, and that all others stand continued to the next term, and this court is now adjourned without day.

Attest: Albert S. Austin, clerk.

* "A true copy of record.

Attest: Albert S. Austin, clerk.

Savage and Oakes, for the plaintiff.

The plaintiff was made a party to the original suits and hence is entitled to this remedy. *Spaulding's Practice*, 441. *Porter v. Rummary*, 10 Mass. 64; *Shirley v. Lunenburg*, 11 Mass. 379.

The declaration was demurrable; it was likewise amendable. *Bennett v. Davis*, 62 Maine, 544.

The account annexed setting forth no items more than a "balance" is insufficient. The account annexed is a part of the record and should be fully recorded. *Baker v. Moor*, 63 Maine, 446.

The omission of the account annexed, from the record was not considered in *Bean v. Ayers*, 70 Maine, 421.

It seems to have been thought by some that if the defect was amendable that would necessarily preclude the sustaining of a writ of error. We do not so understand the law. There is no reported case which so decides it. There are cases in which the errors were amendable, where the courts have refused to set aside the judgement, but those were cases where the errors alleged were "want of form only" or "circumstantial errors or mistakes which by law are amendable" and where "the person and case can be rightly understood." R. S., c. 82, § 10.

When can the person and case be rightly understood from the records? Clearly when the record contains sufficient *discriptio personæ* and *discriptio causæ* to enable it to be successfully used in evidence under a plea in bar to a suit on the same cause of action. See *Bennett v. Davis*, *supra*.

The counsel further contended that the return of the officer did not show a valid attachment. The return does not show for what reason it was recorded in the town clerk's office. All the substantive facts which alone could authorize such an attachment must appear affirmatively in the return and be a part of the record. *Haynes v. Small*, 22 Maine, 14; *Drake Attachment*, § 205.

H. A. Randall and *James S. Wright*, for the defendants, cited: *Parks v. Crockett*, 61 Maine, 494; *Piper v. Goodwin*, 23 Maine, 251; *Page v. Danforth*, 53 Maine, 174; *King v. Robinson*, 33 Maine, 114; *Paul v. Hussey*, 35 Maine, 97; *Kirby v. Wood*, 16 Maine, 81; *Valentine v. Norton*, 30 Maine, 199; *Lovell v. Kelley*, 48 Maine, 265; *Starbird v. Eaton*, 42 Maine, 571; *Storer v. White*, 7 Mass. 448; *Thompson v. Gilmore*, 50 Maine, 430; *Lord v. Pierce*, 33 Maine, 350; *Weston v. Palmer*, 51 Maine, 73; *Bean v. Ayers*, 70 Maine, 421.

HASKELL, J. Writs of error to reverse, for errors in law, four several judgments of this court, rendered in the county of Oxford.

The transcripts presented at the trial prove records, that comply with the requirements of the statute, R. S., c. 79, § 11, and show the nature of the judgments rendered. The records of the judgments sought to be reversed are sufficient in form for abbreviated records under the statute, however defective they may be without its aid. Writs of error, for errors in law, lie only for defects apparent upon the face of the record. *Valentine v. Norton*, 30 Maine, 194; *Paul v. Hussey*, 35 Maine, 97; *Starbird v. Eaton*, 42 Maine, 569; *McArthur v. Starrett*, 43 Maine, 345; *Wood v. Leach*, 69 Maine, 555.

If there be error in law, that would appear from an extended, full record, which either party desires to avail himself of upon a writ of error, he should, before trial, require the clerk to make a full, extended record of the judgment sought to be reversed, and if he refuses so to do, procure an order from the court directing such record to be made, and then present a transcript

of such extended, full record, that the court may know from inspection of it whether an error exists.

In the case at bar, the parties have agreed, that the pleadings omitted from the records, may be treated as properly included in them, and under the peculiar circumstances, that agreement will be regarded by the court.

Two errors in law are assigned.

1. That the accounts annexed to the writs are insufficient. The actions were assumpsit, according to the accounts annexed. The accounts set out claims for labor performed and the price demanded. The plaintiff in error was duly cited to become party defendant in those actions, but interposed no defense. The insufficiency of the declarations, it might have availed itself of. It did not do it. The objections presented come too late. They are not available in this action. They were proper subjects of amendment, and are cured by default. Enough is shown by the declarations to sustain the judgments rendered. Full and complete averments show, that the services sued for were rendered upon the logs attached, and that the suits were seasonably brought. The statute provides that no proceeding shall be reversed for error, that by law is amendable. R. S., c. 82, sec. 10.

2. That there was no sufficient attachment of the logs. The record recites a command in the writs, for the officer to attach certain specified logs, upon which a lien is claimed, and a return of the officer, that he did attach the same and put his mark upon them, and that, within five days thereafter, he filed in the clerk's office of the town where the logs lay the usual copy of his attachments. Attachments of chattels are made by gaining possession of the property attached; and in certain cases may be preserved by recording the attachments and abandoning the actual possession, or control.

In these cases the property attached was logs on the bank of a river, clearly, property that could not have been immediately removed to a place of keeping within the absolute control of the officer, by reason of its bulk; and actual possession of it, he

could only retain by his presence, or the presence of his servant, at unnecessary cost. The record discloses an attachment within the express terms of the statute, followed by judgment *in rem*, without error, or fault. The defendants have interposed no plea, and the order is,

Plaintiffs nonsuit.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

WILLIAM H. HULL vs. ARTELL A. HALL and another.

Waldo. Opinion January 28, 1886.

Master and servant. Defective machinery.

A master's liability for an injury to his servant caused by defective machinery, furnished by the former for the latter's use, is not absolute.

To render the master liable for an injury to his employee caused by defective machinery furnished by the former for the latter's use, it must appear that the master knew, or by the exercise of proper diligence ought to have known of its unfitness, and that the servant did not know, or could not reasonably be held to have known of the defect.

AN action to recover damages for personal injuries received by the plaintiff April 29, 1881, in the defendants' saw mill in Damariscotta, where he was employed by the defendants in sawing pickets, by reason of alleged defective, unsuitable and unsafe machinery furnished by the defendants. The plaintiff lost all the fingers of one hand by the injury.

At the trial the plaintiff's counsel requested that the following instruction be given to the jury :

"When defendants set plaintiff at work sawing pickets upon their circular saw, they were in duty bound to provide good and sufficient machinery for that purpose, with such safeguards against injury to him in running the saw, as common experience in that business had shown to be necessary, whether the defendants personally knew that such safeguards were necessary or not."

The presiding judge instructed the jury upon the point, as follows :

"Gentlemen : I so instruct you. Upon that point I rule the law as it is claimed by the plaintiff's counsel. To that extent their liability is absolute. When they engage in a business that

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requires machinery, they must see to it at their peril that the machinery, which they require their workmen to operate, is reasonably safe. The law does not require extraordinary care to apply to their machines all modern improvements instantaneously, but they must provide such safeguards, they must see that their machinery is provided with such safeguards against injury to their workmen, as is usual in the business; or, as I stated before, they must see to it at their peril that the machinery is reasonably safe."

The verdict was for the plaintiff for nine hundred and thirty-five dollars, and the defendant alleged exceptions to the foregoing instruction.

A. P. Gould, for the plaintiff.

The first instruction given to the jury by request of plaintiff's counsel, was correct; especially as explained by the presiding judge. *Buzzell v. Linconia Manf'g Co.* 48 Maine, 113; *Lawler v. Androscoggin R. R. Co.* 62 Maine, 463; *Shearman & Redfield on Negligence*, § § 92, 93 and notes; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572.

It is not necessary to prove that the defendants knew that the lack of a bunker and a splitter, or guard, upon their picket machine was a defect.

The duty is absolute upon an employer of laborers in the use of machinery, to see that the machinery is properly constructed, and provided with the ordinary safeguards against peril to the employee, or such as "common experience in that business had shown to be necessary."

In *Noyes v. Smith*, 28 Vt. 59, the plaintiff was in the employ of the defendants as engineer, with a defective fire-box, of which neither plaintiff nor defendants were aware. In consequence of such defect an explosion occurred, by which the plaintiff was injured. The defendants were held liable, because they might have discovered the defect by the exercise of proper care and vigilance.

In *McGatrick v. Wason*, 4 Ohio St. 566, THURMAN, C. J., said: "The general rule is, that an employer, who provides the

machinery and controls its operation, must see that it is suitable and if an injury to the workman happens by reason of a defect unknown to the latter, and which the employer, by the use of ordinary care could have cured, he is liable for the injury."

In *Ford v. Fitchburg R. R. Co.* 110 Mass. 240, it was held that "One employed by a railroad corporation to drive a locomotive engine over its road, may recover damages against the corporation, for personal injuries caused by a defect in the engine which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents." The negligence of the defendants might have consisted in not discovering the defects. *Fifield v. Northern R. R.* 42 N. H. 225, 235.

In an excellent opinion reported in the Albany Law Journal, Vol. xxiv, p. 70, in *Cowles v. Richmond & Danville R. R. Co.* 84 N. C. the court say: "Every person who admits another into his employment, whereby constitutes him a servant, is bound to furnish and maintain such instruments as are suitable to his work, and as may be used with safety to the person employed. The law, by implication, makes such a stipulation a part of every contract for service; and in proportion as the employment is hazardous, so is the rigid enforcement of the master's duty." See also *Hough v. Railroad Co.* 10 Otto (100 U. S.), 213; *Holden v. Fitchburg R. R. Co.* 139 Mass. 268.

William H. Fogler, for the defendants, cited: *Shanny v. Androscoggin Mills*, 66 Maine, 427; *Coombs v. New Bedford Cord. Co.* 102 Mass. 586; *Sullivan v. India M'f'g Co.* 113 Mass. 396; *Wheeler v. Wason M'f'g Co.* 135 Mass. 298; *Buzzell v. Laconia M'f'g Co.* 48 Maine, 113; *Hayden v. Smithville M'f'g Co.* 29 Conn. 548; *O'Connor v. Adams*, 120 Mass. 431; *Walsh v. Peet Valve Co.* 110 Mass. 25; *Ryan v. Tarbox*, 135 Mass. 208; *Loonan v. Brockway*, 3 Robt. (N. Y.) 74.

VIRGIN, J. The verdict having been for the plaintiff, the question presented by the bill of exceptions is whether the

instructions given at the request of the plaintiff are sufficiently favorable to the defendants.

Without elaborating the variously expressed but universally acknowledged rule of law involved, it is sufficient to say: When the relation of master and servant is created between two persons by a simple mutual agreement, that one of them, at an agreed compensation, shall work for the other in the latter's saw-mill, all the terms of the contract are not expressed, and those not expressed are left to implication. In such case, it is implied among other things, on the part of the master, that he shall use ordinary care and diligence in supplying and maintaining for the servant's use in that more or less hazardous business, such saws and appliances as are reasonably safe. And the correlative implication on the part of the servant is, among other things, that he shall take upon himself the risks which ordinarily attend or are incident to the business in which he thus voluntarily engages.

The implied duty of the master being measured by the legal standard of ordinary care, his knowledge or want of knowledge of the actual condition of the machinery when it falls below the legal standard of being reasonably safe and causes the injury, becomes a material element. *Buzzell v. Laconia Man'f Co.* 48 Maine, 113, 122. Hence, although not a complete defence necessarily, it is admissible for the defendant to testify that he had no knowledge or information of its defective condition. *Boyle v. Mowry*, 122 Mass. 251. When the master, therefore, does not know of the dangerous condition of the machinery and has exercised that standard of care in relation thereto, he has discharged his duty and there is nothing of which negligence can be predicated. And such is the result of all the cases. Hence writers upon this topic have said: "If the master knew or ought to have known, and the servant did not know, and was not bound to know of its existence, the liability of the master — the servant having been otherwise in the exercise of due care — is fixed. And it is equally true in every case, that unless the master knew of the defect which subsequently produced the injury, or was under a duty of knowing it, he cannot be held liable." 2 Thomp. Neg. 992-3. Or as the same view is expressed

by another: "To render the master liable, it must appear that he knew, or from the nature of the case ought to have known of the unfitness of the means of labor furnished to the servant, and that the servant did not know, or could not reasonably be held to have known of the defect." Beach Con. Neg. § 123.

We are of opinion, therefore, that since knowledge on the part of the master, or its equivalent—negligent ignorance—is essential to hold the master, the first instruction making the master's liability absolute was not sufficiently favorable to the defendants and may have misled the jury. Having no occasion to pass upon the other exception, therefore, the entry must be,

Exceptions sustained.

PETERS, C. J., WALTON, LIBBEY, FOSTER and HASKELL, JJ., concurred.

ELLA P. BURRILL vs. CITY OF AUGUSTA.

Kennebec. Opinion January 30, 1886.

Fire department officers, liability of municipality for acts of.

The officers of the fire department of a municipality are public officers, and not the mere servants or agents of the municipality.

A city is not liable for the act of the officers of its fire department, unless made so by express statute, or unless the act complained of was expressly ordered by the city government.

ON EXCEPTIONS.

The opinion states the case.

H. M. Heath, for the plaintiff.

With grave doubts as to the sufficiency of the count demurred to, I cite, as tending to support the count, *Lee v. Sandy Hill*, 40 N. Y. 442; *Hill v. Boston*, 122 Mass. 344; *Gordon v. Taunton*, 126 Mass. 349; *Bailey v. Woburn*, 126 Mass. 416.

Winfield S. Choate, city solicitor, for the defendant, cited: *Edgerly v. Concord*, 59 N. H. 78; *Welsh v. Village of Rutland*, 56 Vt. 228; S. C. 48 Am. Rep. 762; *Fisher v. City of Boston*, 104 Mass. 87; S. C. 6 Am. Rep. 196; *Hafford v. New Bedford*, 16 Gray, 297; *Jewett v. City of New Haven*, 38 Con. 368; 9

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104	225

Am. Rep. 382; *Wilcox v. City of Chicago*, 107 Ill. 334; S. C. 47 Am. Rep. 434; *Black v. City of Columbia*, 19 S. C. 412; S. C. 45, Am. Rep. 785; *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; S. C. 2 Am. Rep. 368; *Robinson v. City of Evansville*, 87 Ind. 334; S. C. 44 Am. Rep. 770; *Simon v. City of Atlanta*, 67 Ga. 618; S. C. 44 Am. Rep. 739; *Greenwood v. Louisville*, 13 Bush. 226; S. C. 26 Am. Rep. 263; *Smith v. Rochester*, The Reporter, Vol. 8, p. 178, Ct. of Appeals; and *O'Meara v. New York*, 1 Daly, 425; *Van Wert v. Brooklyn*, 28 How. Pr. 451; Shearman and Redfield on Negligence, 3d edition, § 139, and cases cited in note; Dillon, on Municipal Corporations, 2d ed. p. 887, § 774.

DANFORTH, J. The plaintiff, in her writ, substantially alleges that the officers of the fire department of the defendant city, having occasion to use a steam fire engine belonging to said city, for a necessary purpose, after said use, carelessly and negligently allowed the engine to stand within the limits of a public street in said city, and while so standing negligently, drew the fire and permitted the steam to escape therefrom with a great noise, whereby the plaintiff's horse, which she was rightfully driving upon the same street, was frightened, ran away, and the plaintiff, without any fault on her part, was thrown to the ground and injured.

To this declaration a demurrer was filed which was sustained by the court. To this ruling exceptions were filed.

Thus the sole question presented is the liability of a municipal corporation for the negligent acts of the officers of its fire department while in the discharge of their official duties.

The statute provides that cities and towns may organize a fire department, provide for the election of the necessary officers and "prescribe their style, rank, powers and duties." R. S., c. 26. The object and purpose of this organization is public and not private. It is not intended to, nor does it especially advance the corporate interest, or immediate emolument of the city or town where it is established. Its advantages may indeed be great, but they are indirect and enjoyed in common with the

public. The officers, though chosen directly by or under ordinances, or by-laws established by cities and towns, are public officers, performing public duties, acting upon their own responsibility, controlled by fixed principles and established rules as found in the laws applicable, with no power of control over, or to impose any obligation upon the corporation, except so far as such authority may be conferred by express statute or act of the corporation. They are a part of the municipal government, and not servants or agents of the municipality. Hence their relation to their respective cities and towns differs in no respect from that of municipal officers generally.

The absence of corporate liability for the acts of municipal officers, with its limitations and exceptions, has been so fully discussed, both in our own state and others, and with such uniformity as to result that it is unnecessary to go over the ground again. *Mitchell v. Rockland*, 52 Maine, 118; *Brown v. Vinalhaven*, 65 Maine, 402; *Woodcock v. Calais*, 66 Maine, 234; *Hill v. Boston*, 122 Mass. 344; *Gordon v. Taunton*, 126 Mass. 349; Wharton on Negligence, § 191, and cases cited. That the principles settled in these cases are equally applicable to the officers of the fire department, follows from the nature of their office as above stated, and is shown by *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297; Shearman and Redfield on Negligence, § 139; Dillon on Municipal Corporations, (3d ed.) § 976.

A careful examination of these cases will show that the municipal corporation has been held liable for the negligence of its officers only when made so by an express statute, or the act out of which the claim grew was directly and expressly ordered by the corporation. Neither of these exceptions are found in this case. No statute is relied upon. None exists imposing any responsibility, except where buildings are demolished to prevent the extension of fires, and there is no pretence that the act complained of was authorized or directed by any express order of the defendant city.

Exceptions overruled.

PETERS, C. J., WALTON, LIBBEY, EMERY and FOSTER, JJ., concurred.

RAMSON ABBOTT and others, in equity, vs. JAMES M. TREAT.

Waldo. Opinion February 2, 1886.

Waters. Shore. Equity. Deed. Bond. Fraudulent representations.

The shore adjoining tide waters, not exceeding one hundred rods in width, belongs to the owner in fee of the uplands adjoining when bounded by such waters; but it may be severed by the owner, and he may sell either or both. The plaintiff conveyed by warranty deed to the defendant a parcel of land bordering upon Penobscot Bay, the southerly boundary of which, as stated in the deed, was "to a stake and stones on the shore of Penobscot Bay, thence southwesterly by said shore to the extremity of Squam Point, so called," etc. A third party had a right of fishery, by prior deed, in the waters on that side of defendant's land, with all privileges necessary for carrying on the same, and which was not mentioned in the deed from the plaintiff to the defendant. An action of trespass had been brought by such third party against the defendant and judgment recovered, but damages had not been assessed or execution issued. The defendant represented to the plaintiff that by reason of the covenants contained in his deed, the plaintiff was liable to pay whatever judgment and costs should be recovered against the defendant in the trespass suit, and the plaintiff thereupon executed a bond to the defendant for the payment of the same. Upon a bill in equity brought to cancel said bond, *Held*: That such representations would not warrant a court of equity in cancelling said bond.

It is a rule applicable alike in courts of equity as well as in courts of law, that fraud is not to be presumed, but must be established by proof.

A representation of what the law will or will not permit to be done, will not ordinarily amount to such fraud as a court of equity will take cognizance of, but is to be regarded rather as the expression of an opinion than the assertion of a fact.

ON REPORT.

Bill in equity brought to cancel a certain bond given by the plaintiffs to the defendant, March 5, 1884.

The opinion states the essential facts. The action of trespass referred to in the opinion was before the law court and was reported in 75 Maine, 594 (*Matthews v. Treat*).

Joseph Williamson, for the plaintiffs.

When the bond was given Treat could not have maintained an action against Abbott for breach of warranty because he had not then been damnified. *Wheeler v. Sohler*, 3 Cush. 224; *Emer-*

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son v. *Minot*, 1 Mass. 464; *Montgomery v. Reed*, 69 Maine. 515.

Then again the essence of Matthews' action against Treat was an invasion of the right of the former to take fish. Abbott's deed bounds the land conveyed to the defendant "by the shore." That "the shore" of waters where the tide ebbs and flows, means the ground between high and low water mark, and that the word "by" when used in bounding land is a word of exclusion has been long settled. *Storer v. Freeman*, 6 Mass. 435; *Niles v. Patch*, 13 Gray, 254; *Nickerson v. Crawford*, 16 Maine, 245; *Montgomery v. Reed*, 69 Maine, 510.

Abbott was never notified of, or vouched in to defend the Matthews' suit. The right to an action against the covenantor has never been recognized without such notice until after judgment on eviction. *Ryerson v. Chapman*, 66 Maine, 557.

The representations were false and fraudulent. Any act falsely intended to induce a party to believe in the existence of some other material fact, and having the effect of producing such belief, to his injury, is a fraud. *Trambly v. Ricard*, 130 Mass. 259.

And the bond being without consideration and given solely on account of the fraudulent representations of the defendant, the plaintiff is entitled to the remedy asked for. *Somes v. Brewer*, 2 Pick. 184; *Kellogg v. Curtis*, 65 Maine, 59; *Fuller v. Percival*, 126 Mass. 381; *Commercial Ins. Co. v. McLoon*, 14 Allen, 351; *Martin, v. Graves* 5 Allen. 601; *Hulsman v. Whitman*, 109 Mass. 411.

Thompson and Dunton, for the defendant.

FOSTER, J. It is unnecessary in this case to consider how far equity extends its jurisdiction for the cancellation of written instruments obtained by fraud. From a very careful examination of the evidence we are satisfied that there was no such fraud as would justify the intervention of a court of equity, and for that reason the bill cannot be sustained. Divested of all legal verbiage, the bill alleges that the defendant falsely and knowingly represented to the plaintiff that he, the plaintiff, was liable upon his covenants in a certain deed, given by the plaintiff

to the defendant, to pay whatever judgment and costs one James D. Mathews had recovered or might recover in an action of trespass against this defendant.

The prime cause of these representations, without going into unnecessary detail, was this: The plaintiff had conveyed by warranty deed to the defendant a parcel of land bordering upon Penobscot Bay, the southerly boundary of which, as stated in the deed, was "to a stake and stones on the shore of Penobscot Bay, thence south-westerly by said shore to the extremity of Squam Point, so called," etc. James D. Mathews, as it appears, had a right of fishery, by prior deed, in the waters on that side of the defendant's land with all the privileges necessary for carrying on the same, and which was not mentioned in the deed from the plaintiff to the defendant. An action of trespass had been brought by said Mathews against the defendant and judgment recovered, but damages had not been assessed or execution issued at the time of the alleged representations. The defendant then claimed, and as appears from the answer to this bill, as well as by the evidence in this case, now claims, that his deed from the plaintiff covered the shore or flats in front of his main land; and that at the time of the conveyance to him the premises were encumbered with the right of fishery as before stated. The plaintiff, on the other hand, now claims that his deed only extended to the shore, and did not embrace within its boundaries that portion claimed by the defendant between high and low water mark.

While it may be admitted that the question now before this court is not where, on the south or in front of this land, the true boundary line is, yet in one sense it has a legitimate as well as important bearing on the question at issue in throwing some light upon the character of the alleged representations. From the evidence it is impossible to determine correctly whether the plaintiff's deed extends below high water mark or not. The language is "to a stake and stones on the shore." "The shore is the ground between ordinary high and low water mark — the flats." *Montgomery v. Reed*, 69 Maine, 514. It may be narrow, or it may be many rods in width. Since the colonial

ordinance of 1641, now a part of the common law of this state, the shore adjoining tide waters, not exceeding one hundred rods in width, belongs to the owner in fee of upland adjoining when bounded by such waters; but it may be severed by the owner, and he may sell either or both, or he may by definite boundaries and monuments exclude the shore, or any part of it, in a conveyance of the upland. Whether the shore or flats, or any part of the same, pass by deed of the upland adjoining depends of course upon the terms of the conveyance.

In this case the boundary extends "to a stake and stones on the shore of Penobsot Bay, thence southeasterly by said shore to the extremity of Squam Point, so called." The evidence does not show whether the stake and stones were at high or low water mark; or at what particular point on the shore they were located. It does show, however, that the "extremity of Squam Point" was between high and low water mark. Hence, as the shore has two sides, if the stake and stones, being the particular monument named, were at low water mark, they would nevertheless be on the shore equally as if they were at high water mark. As PARSONS, C. J., has said in *Storer v. Freeman*, 6 Mass. 438, a case many times cited by the courts, "a boundary line is described to run to a heap of stones by the shore at Elwell's corner. The shore has two sides, high water mark and low water mark. Elwell's corner is described as a known monument. If it is at low water mark, it is by the shore, as well as if it was at high water mark. Now, if it be a fact, that this corner was a known monument at low water mark, the plaintiffs might be admitted to prove it by oral testimony. Then the boundary line, running to Elwell's corner, would cross the flats to low water mark; and the next boundary line running by the flats must run by the same side of the flats on which Elwell's corner stands; and thus the flats would be included by the boundaries of the land conveyed by the second deed." Applying these principles to this case, and from all the evidence before us, with the language of the deed to be taken most strongly against the grantor, we are not satisfied that the defendant may not be as correct in his claim to the location of the line as the

plaintiff is in his position in regard to it. Whatever the location may be in fact we need not now determine. All we need say is that the assertion of title to the shore or flats was one not wholly without foundation on the part of the defendant. He had asserted title to them in the trespass suit, and sets it up in his answer to this bill. The whole evidence goes to show that at the several times he saw the plaintiff before the bond was given indemnifying him against all loss, cost and expense on account of the trespass suit, as well as at the time his agent Small, procured the bond — the time when the alleged false and fraudulent representations were made — he honestly believed that his deed from the plaintiffs to him included the shore or flats.

What then in regard to the alleged false and fraudulent representations made by said Small?

It appears that the plaintiffs and defendant had met in reference to this claim of the defendant at least twice before that, and after judgment had been rendered against the defendant, and talked over this matter in reference to indemnity against the trespass suit. The defendant advised him to get counsel, and at each interview notified him he should commence suit upon his covenants if indemnity was not furnished. The plaintiff, had he desired so to do, could have consulted counsel in reference to his liability after being thus notified. He had ample time and opportunity. After waiting several days the defendant sent his agent Small to make some arrangement that day. It is alleged that the defendant through his agent falsely and knowingly represented to the plaintiff that he was liable upon his covenants to pay whatever judgment and costs had been or might be recovered against the defendant in the suit for trespass.

Admitting this to have been said, it was rather a representation of the law than the misrepresentation of any fact, and as laid down by the authorities would not, under the circumstances disclosed in this case, amount to fraud such as a court of equity would take cognizance of. Professor Pomeroy in his work on equity jurisprudence, discussing the nature of fraud and misrepresentations cognizable by a court of equity, says: "A misrepresentation of the law is not considered as amounting

to fraud, because, as it is generally said, all persons are presumed to know the law; and it might perhaps be added, that such a statement would rather be the expression of an opinion than the assertion of a fact." 2 Pom. Eq. Juris. § 877.

In *Fish v. Clelland*, 33 Ill. 243, the principle is expressed in these words: "A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such." To the same effect may be cited the following authorities. *Upton v. Tribilcock*, 91 U. S. 50; *Star v. Bennett*, 5 Hill, 303; *Lewis v. Jones*, 4 B. & C. 512; *Grant v. Grant*, 56 Maine, 573.

By this it should not be understood that we mean to say that there may be no case of misrepresentation in regard to the law where a court of equity would not intervene. It may be that if a party should intentionally deceive another by misrepresenting the law to him, or knowing him to be ignorant of it should thereby knowingly take advantage of his ignorance for the purpose of deceiving him, a court of equity would grant relief on the ground of fraud.

But we do not feel that this case falls within that principle. An examination of the evidence leaves no doubt in the mind that the defendant believed the plaintiff liable upon his covenants for the amount of damage and cost in the Mathews suit. Judgment had been rendered against him. Costs and expenses had been incurred by him in attempting to maintain his title to what undoubtedly he believed his deed included. And if his position is correct as to the location of the line — if his deed includes the shore — then the plaintiff was liable on one or more of the covenants at the time the bond was given. *Harlow v. Thomas*, 15 Pick. 69; *Bachelder v. Sturgis*, 3 Cush. 206; *Lamb v. Danforth*, 59 Maine, 324; *Scriven v. Smith*, 3 East. Rep. 195; *Adams v. Conover*, 87 N. Y. 422.

Although it is alleged in the bill that the defendant threatened to commence suit and attach the property of the plaintiff if the bond was not executed, it is not claimed that these representations were not true, or that they were false and fraudulent. Unquestionably such was the intention of the defendant. The answer admits it; and he so testifies. And while it is inserted in the bill in connection with the alleged fraudulent representations, it is two edged, and may be properly regarded as strongly corroborative of the fact that the defendant believed the plaintiff liable upon his covenants to indemnify him against the judgment in the trespass suit.

It is a rule applicable alike in courts of equity as well as in courts of law, that fraud is not to be presumed, but must be established by proof. 1 Story Eq. § 190. As the charge alleged is fraud, it is incumbent on the plaintiff to satisfy the court of that fact, not merely that the representations were made, or that the defendant was imperative in pressing a claim which he believed the plaintiff liable to pay. In this case the evidence is not sufficient to support the allegation, and entry must be,

Bill dismissed with costs.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

RICHARD HAMOR and another vs. BAR HARBOR WATER CO.

Hancock. Opinion February 2, 1886.

Eminent domain. Waters. Legal taking. Evidence. Damages. Remedy.

Private property may be taken by the sovereign power of the government in the exercise of the right of eminent domain for purposes of public utility. Interests in water, as well as in land, may be taken by virtue of this power, and both are equally the subjects of compensation.

It is a well established rule, that where damage is necessarily done to the property of an individual by being taken by authority of the legislature for public use, such damage can be recovered only in the manner authorized by statute.

To constitute a legal taking however, by which those acts which cause the damage can be justified, and thereby remit the party to such exclusive statutory remedy, it must be shown that the requirements of law have been strictly complied with.

78	127
85	116
78	127
98	375
78	127
100	361

In all cases where private property is taken in the exercise of the right of eminent domain, whether it be in lands, or the usufructuary interest in flowing water, the taking must be evidenced by some writing describing the estate so taken by definite and specific boundaries, quantity or measure, according to the nature of the property taken.

ON REPORT.

An action of the case for diverting one-half the water running in Duck brook in Eden from the plaintiffs' mill situated near the mouth of that brook.

At the trial the only question submitted to the jury was the assessment of damages, and they returned a verdict for \$347.70. The case was then reported to the law court with so much of the evidence introduced by the defendant as tended to justify the diversion.

The following is the notice and plan referred to in the opinion. The notice was published in a public newspaper, published in the county, as required by the act of the legislature cited in the opinion.

"Bar Harbor Water Company — Notice is hereby given to all concerned that the Bar Harbor Water Company have located on the following lands, as see plans filed with the town clerk of Eden: A dam on the outlet of Eagle Lake. A dam on the Duck Brook stream, at the lower end of the Meadows, so-called. A route for an aqueduct, commencing at the dam on the Duck Brook stream at the town end of the Meadows, and running through lands of S. E. Lyon, A. P. Cunningham, E. Salisbury or others, Mr. Low or others, Lewis Day or others, Amos Richardson, T. Roberts or others, estate of R. Y. Higgins, J. Salisbury, Lynde or others. Also a reservoir on the land of Lynde or others. [Signed] Bar Harbor Water Company.

Bar Harbor, April 14, 1874."

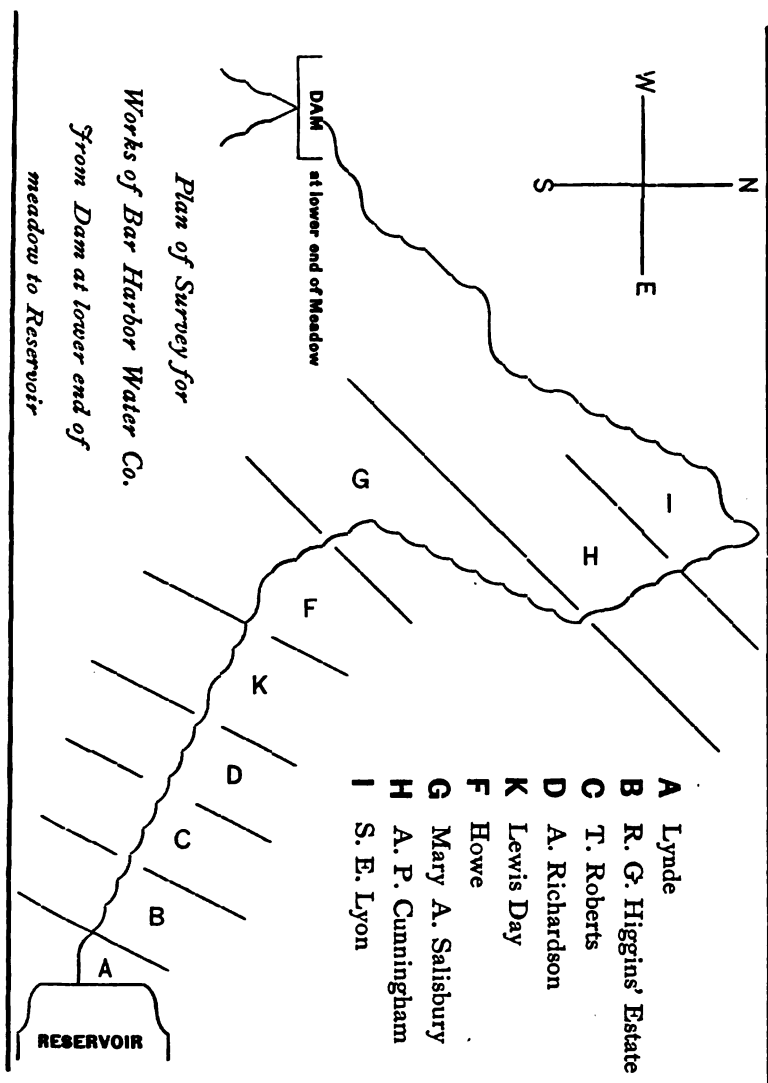
Jasper Hutchins, for the plaintiffs.

Wiswell and King, for the defendant.

The status of the defendant corporation in very many respects has been established in the recent case of *Riche v. Bar Harbor Water Co.* 75 Maine, 91.

That was an action of trespass for entering the plaintiff's premises and building a reservoir, the justification in defense was

the same as in the case at bar and the court held that the action could not be maintained.



The plan of the location was made and filed and the notice published in compliance with the act of the legislature — and the

plan and notice met the requirements of the act. The remedy provided by the act, for parties whose property or rights in property have been taken, must be followed. It takes the place of the common law remedy. *Stowell v. Flagg*, 11 Mass. 364; *Stevens v. Propr's Middlesex Canal*, 12 Mass. 468; *Heard v. Same*, 5 Met. 81; *Sudbury Meadows v. Middlesex Canal*, 33 Pick. 36; *Spring v. Russell*, 7 Maine, 273; *Riley v. Lowell*, 117 Mass. 76; *Ipswich Mills v. Co. Com.* 108 Mass. 363; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Perkins v. Lawrence*, 136 Mass. 305; *Hull v. Westfield*, 133 Mass. 433; *Bailey v. Woburn*, 126 Mass. 416.

Of course the rule is otherwise if the taking has not complied with the requirements of the act of incorporation. By the act the company was authorized to take the water from Eagle Lake and Duck Pond. By the plan filed and notice published and by the actual construction of the dam and sluice notice was given to all interested. No more particular notice was required or could well be given.

If it be contended that there was no way to determine the amount of water that was to be taken it is respectfully submitted it is very clear that one of two rules must be adopted. Either the company would be liable to the damage that would result from the taking of all the water that could be diverted by the full size and capacity of the works, and in case of an increase of capacity be liable to a further assessment, or else according to the rule fully established by the later Massachusetts decisions cited above, that the plaintiff would be entitled to recover compensation for both future and prospective damages as well as immediate, having in view the amount of water that so far as could be judged would ever be needed.

FOSTER, J. The defendant corporation by special act of the legislature approved February 10, 1874, c. 449, was authorized to take, detain and use the water of Eagle Lake, and Duck Brook, or either of them, for the purpose of conveying to, and supplying the village and vicinity of Bar Harbor with pure water; and to erect and maintain dams and reservoirs, and lay and

maintain pipes and aqueducts necessary for the proper accumulating, conducting, discharging, distributing and disposing of water, and forming proper reservoirs thereof. By this act the corporation is held liable to pay all damages that may be sustained by any persons by the taking of any land, or other property, or by flowage, or by excavating through any land for the purpose of laying down pipes and aqueducts, building dams and reservoirs, and also damages for any other injuries resulting from said acts.

It is also provided that in case damage is sustained and the amount to be paid cannot be mutually agreed upon, then the party suffering such damage may cause the same to be ascertained in the same manner and under the same conditions, restrictions and limitations as are provided in the case of damages by the laying out of highways.

By section 6 "said corporation shall cause surveys to be made for the purpose of locating their dams, reservoirs and pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk of said Eden, and notice of such location shall be given to all persons affected thereby by publication in some public newspaper in said county; and no entry shall be made upon any lands, except to make surveys, until the expiration of ten days from the said filing and publication."

The plaintiffs were the occupants of a saw mill upon Duck Brook, and this action on the case is brought by them to recover damages for the diversion of the water from said stream from March first, 1876, to March first, 1882. The defendants admit that during the time named they have diverted the water by taking it above the plaintiffs' mill so that the water thus diverted has not been allowed to flow down the stream to it; but they claim that such diversion has been in accordance with the provisions of an act of the legislature authorizing them thus to divert the water, and that by that act a method is provided by which all persons injured can recover damages as therein specially set forth, and that therefore the plaintiffs cannot maintain this action.

A special verdict of the jury has settled the amount of damages

which the plaintiffs are entitled to recover provided this action is maintainable.

There can be no question but that the act granting the right to the defendants to take, detain and use the water from the sources and for the purposes therein specified, is constitutional. The decisions are numerous that private property may be taken by the sovereign power of the government in the exercise of the right of eminent domain for purposes of public utility. That this may be done when the object is to supply a village or community with pure water, and though the agency by which it is done may be a private corporation thereby deriving profit and advantage to itself, is not denied. In such case the interests of the public, from considerations affecting the health and comfort of densely populated communities, require that private property may be thus appropriated for uses which are deemed public. It is thus that the right of property of private individuals, whether it be lands, or the usufructuary interest in flowing water, is made to subserve the public exigencies, and for which, under the constitution, "just compensation" is guaranteed and must be made. "It is true the injury in the one case is to the land, and in the other to the water; but this can make no difference in the result. Interests in water, as well as in land, may be taken under this act; and both are equally the subjects of compensation." *Denslow v. New Haven and Northampton Co.* 16 Conn. 103; *St. Helena Water Co. v. Forbes*, 62 Cal. 182; S. C. 45 Am. Rep. 659.

Neither can water be diverted from a private stream under authority granted by the legislature in the exercise of the right of eminent domain for the purpose of supplying a town or village with pure water without making compensation to the riparian proprietors whose rights are thereby injuriously affected. *Bailey v. Woburn*, 126 Mass. 416; *Lund v. New Bedford*, 121 Mass. 286; *Wamesit Power Co. v. Allen*, 120 Mass. 354. Nor can individual property be taken, or individual rights impaired, for the benefit of the public without such compensation. *Canal Commissioners v. People*, 5 Wend. 456.

While not denying the plaintiffs' right to just compensation for any damage they may have sustained to their property, the

defendants deny their right of recovery therefor in this action, claiming that their only remedy is that specified in the private statute hereinbefore named.

Undoubtedly this would be true if the acts of the defendants constituted a legal taking of the water from Duck Brook. The case would then fall within the well established rule, that where damage is necessarily done to the property of an individual by being taken by the authority of the legislature for public use, such damage can be recovered only in the manner authorized by statute. *Perry v. Worcester*, 6 Gray, 546; *Hull v. Westfield*, 133 Mass. 434; *Spring v. Russell*, 7 Maine, 273. To constitute a legal taking, however, by which the defendants can successfully justify their acts, they must show that the requirements of law have been complied with. The party whose property has been appropriated is entitled to demand a strict compliance with all the statutory provisions for his benefit. Being in derogation of the common law right which every citizen has of possessing and enjoying his property, it is to be construed strictly. Contrary to the general rule in case of grants from one person to another, that the words are to be taken most strongly against the grantor, in grants of this nature authorized by the legislature, the words are to be taken most strongly against the grantee.

Therefore, if the defendants have failed of bringing themselves within the requirements of law, then their justification fails, and they are liable for such damage as they may have done to the plaintiffs, as wrong doers, and this action may properly be sustained. *Wamesit Power Co. v. Allen*, *supra*.

The statute authorized the taking, detaining and using of water in which the plaintiffs had valuable rights. That the defendants have taken the water is admitted. Yet it nowhere appears that the taking has ever been evidenced by any writing of any kind whereby the measure of such taking has been, or can ever be, made known to the plaintiffs or any one else. There has been a taking of the plaintiffs' property, resulting in damages to them, but there has been no preliminary act evidenced by any writing specifying and defining what or how much has been taken, or is.

to be taken, which is necessary for the just protection and proper security of the owner of property taken.

In the case of *Lancaster v. Kennebec Log Driving Co.* 62 Maine, 272, the statute there referred to authorized the taking and using of shores, flats, etc. but contained no express requirement that the property taken should be evidenced by any writing whatever, and the court say: "The taking of real estate is by attachment, or levy, or by virtue of some statutory proceedings. In all cases, the taking is to be evidenced by some writing describing the real estate so taken by definite and specific boundaries.

. . . . The statute contemplates a taking within definite bounds. The owner of the land cannot otherwise know whether the action of the defendants is within or without the land, etc., taken, if there are no ascertained or ascertainable limits. Neither can the committee proceed to assess damages upon an indefinite and undetermined tract. It is not for them to ascertain the shores, flats, etc., which are taken by resorting to the uncertainties of conflicting testimony. There must be written evidence of the territory the defendants may elect to take and use." See also *P. S. and P. R. R. Co. v. Co. Com.* 65 Maine, 293.

There is no reason why the same requirements should not apply equally to the taking of water from a stream in which the plaintiffs have valuable riparian rights, as to the taking of land. Both are equally the subjects of property and of compensation. *Ex parte Jennings*, 6 Cow. 526. By the statutes of this state the word land includes all tenements and hereditaments connected therewith, and all interests therein. The riparian proprietor may insist that his right to the use of water flowing in a natural stream shall be regarded and protected as property. *Nuttall v. Bracewell*, L. R. 2 Exch. 9. Such right is not a mere easement or appurtenance but is inseparably annexed to the soil itself. *Dickinson v. Grand Junction Canal Co.* 7 Exch. 299; *Cary v. Daniels*, 8 Met. 480. And the damage for the taking of such right may be greater or less according to the quantity of water diverted as the damage may be greater or less when measured by the quantity of land taken. If it be necessary, therefore, that the taking of land thus appropriated to public use be evidenced by

some writing defining it by definite and specific boundaries, for the same reason should there be like evidence of the measure or quantity of water thus taken. Without this, no proper estimate of damages could be made. Without this, no proper protection would be afforded to the parties without resorting to the "uncertainties of conflicting testimony."

The necessity as well as the propriety of this principle will be readily perceived when applied to the case at bar. Here the the defendants are authorized to take only so much water as may be required for the purposes named in the act. This includes not only what may be necessary for the present wants of the inhabitants, but for their future or prospective wants. But one compensation is contemplated by the provisions of the act, like that afforded in the case of the laying out of highways. Such compensation would include not only the immediate damages caused by the taking, but future and prospective damages as well. *Bailey v. Woborn*, 126 Mass. 420; *Ipswich Mills v. Co. Com.* 108 Mass. 365.

The whole of the water in the stream has not been taken or diverted. It may well be understood that only so much has been appropriated as the present wants of the inhabitants require. Whether this quantity is to be the measure, or whether it may be doubled, or an appropriation of all the water in the stream may yet be made, there is no writing of any kind to determine. Nor does the plan, or notice of April 14, 1874, in the least afford any evidence upon this question. The notice and plan in this case are entirely different from those referred to in the case of *Riche v. Bar Harbor Water Co.* 75 Maine, 94, 97. By § 6 of the act the defendants were required to cause surveys to be made for the purpose of locating their dams, reservoirs, pipes and other fixtures, and cause accurate plans of such location to be filed in the office of the town clerk, and notice of such location to be given to all persons affected thereby. If the plaintiffs were to be considered as embraced among those affected by the location of the defendants' dams, reservoirs, pipes or other fixtures, neither the plan nor the notice, in this case, could be considered as sufficiently accurate to determine the rights of the defendants in the

water of a stream wherein the plaintiffs had important and valuable interests, nor to measure the quantity of water to be taken.

Furthermore, the evidence shows that in 1880, six years after the defendants began to divert the water from the stream, changes were made in the flume, the length between where the water was taken and the receiving reservoir being shortened nearly one-half, and the main pipe, extending from the reservoir to the village, enlarged from four inches to one of ten inches in diameter.

Not only, therefore, is the evidence, so far as the plaintiffs' rights are concerned, too uncertain, but the use of the grant too fluctuating, to afford a legal justification to the defendants; and the conclusion of the court is that this action may be maintained.

Judgment on the verdict.

PETERS, C. J., DANFORTH, VIRGIN and HASKELL, JJ., concurred.

INHABITANTS OF WINTERPORT vs. INHABITANTS OF NEWBURGH.

Waldo. Opinion February 2, 1886.

Paupers. Settlement. Persons, non compos mentis.

A person, *non compos mentis*, though more than twenty-one years of age, not emancipated, can not acquire an independent settlement by a residence in a town for five successive years, but will follow the settlement of the father. The father of such unemancipated *non compos* person, while living in the defendant town, ten years before he removed therefrom, made application for relief to the overseers of the poor of that town, which relief was thereafter furnished each year to 1868, when he moved to the plaintiff town, and, with the exception of that year, relief was afterwards furnished by the defendant town till January, 1882, two years prior to the commencement of this suit. *Held:*

That the settlement of the father was not changed from the defendant to the plaintiff town; and that the only question involved was whether the supplies afterwards furnished by the plaintiff town were necessary and proper within the meaning of the statute.

ON REPORT.

An action to recover for money paid for the board and care of Miss Nancy Holmes, from January 1, 1882, to January 1, 1884, one hundred and seventy-six dollars and eight cents, and

interest, seven dollars and seventy-eight cents, total one hundred and eighty-three dollars and seventy-eight cents. After the evidence was out the action was withdrawn from the jury and reported to the law court to render such judgment as the law and the evidence required.

The opinion states the material facts.

N. H. Hubbard, for the plaintiffs.

Brown and Varney, for the defendants, contended that the aid furnished by Newburgh was not furnished as pauper supplies, citing *Veazie v. Chester*, 53 Maine, 29.

FOSTER, J. Assumpsit for the recovery of pauper supplies furnished by the plaintiff town to one Nancy Holmes, a *non compos* daughter of Jeremiah Holmes, whose settlement is admitted to have been in the defendant town from 1837 to 1868. From the year last named to the commencement of this suit, the father resided in the plaintiff town. The alleged pauper is *non compos mentis*, and has been so from early childhood. Having always lived in her father's family till the fall of 1881, never having before that time been emancipated or abandoned, though more than twenty-one years of age, she may be regarded, in her legal relations pertaining to pauper settlement, the same as if she were a minor. Such person, not emancipated, can not acquire an independent settlement by a residence in a town for five successive years, but will follow the settlement of the father. *Islesborough v. Lincolnville*, 76 Maine, 575.

The case shows that ten years before the father moved from the defendant town he made application to the overseers of the poor of that town for aid in taking care of this daughter, that it was thereafter furnished each year and paid quarterly up to the year he moved from the defendant town to Winterport, and, with the exception of that year, has ever since been furnished by the defendant town up to January, 1882. His settlement therefore remained in the defendant town.

Really, then, the only question presented for our consideration is whether the supplies afterwards furnished by the plaintiff

town—from January, 1882, to January, 1884, — were necessary and proper within the meaning of the statute. Due notice and denial are admitted.

The pecuniary ability of the father appears to have been substantially the same during all the years in which he was receiving aid on account of this child, not only while living in Newburgh, but also during the twelve or thirteen years in which he was assisted by that town after his removal to Winterport. In the fall of 1881, whatever property he then owned, consisting of a small farm incumbered for nearly its value, besides a horse, cow and a small quantity of furniture, he conveyed, for the support of himself and wife during life, to his other daughter, Mrs. Bussey. His wife had been blind and helpless for several years. At the time of this conveyance to Mrs. Bussey, the defendant town was furnishing assistance to the father on account of the pauper, and afterwards made the last quarterly payment for that year to the husband of Mrs. Bussey, who then appeared to be the head of the family.

It is a legal presumption that the officers of the defendant town performed their duty in their investigations as to the necessity of that relief furnished by their town for more than twenty years. The evidence in the case is sufficient to show that such relief was not only applied for and furnished, but was received as pauper supplies during all those years. There is no evidence to sustain the position of the defense, that such aid was furnished as a gift or loan to the parent, or that there was any understanding between the party receiving such aid and the party furnishing it, that the same should not be considered as supplies furnished under the statutes. Nor is there anything to show that any arrangement was made for the support of the pauper at the time of the conveyance to Mrs. Bussey. Application was made to the overseers of the plaintiff town for relief on account of the pauper, and after investigation the same relief was furnished as had been done years before by the defendant town. The necessity was certainly as imperative during the two years covered by this suit, when the pauper was not a member of the father's family, with no legal provision for her care and support,

as when the parental and filial relation subsisted and she was a member of her father's family and under his care and protection.

*Judgment for plaintiff for \$183.78 and
interest from date of writ.*

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL,
JJ., concurred.

JOHN A. WATERMAN, judge of probate,

vs.

KATE H. DOCKRAY and others.

78	139
90	504
78	139
91	238

Cumberland. Opinion February 6, 1886.

Executors. Administrator de bonis non. Action. Pleading.

An administrator *de bonis non* is officially interested in his predecessor's bond to the extent of the unadministered assets; and he may originate a suit on it, provided his interest has been specifically ascertained; otherwise he must have authority from the judge of probate to bring the action and can not rely therefor on an authorization given to another person. In either case he must allege such facts in the writ as will authorize him to bring and maintain the action.

ON exceptions to the ruling of the court in overruling defendant's demurrer to the writ and declaration, which latter was as follows :

"To answer unto John A. Waterman, of Gorham, in said county, in whose name this suit is prosecuted by Lewis Pierce, administrator *de bonis non*, with the will annexed, of the estate of James R. Dockray.

"In a plea of debt for that the said defendants at said Portland, on the sixteenth day of December, A. D. eighteen hundred and sixty-eight, by their writing obligatory of that date, sealed with their seals and here in court to be produced, bound and acknowledged themselves to be indebted to the said John A. Waterman, judge of probate of wills, and for granting administration, within the county of Cumberland, in the sum of ten thousand dollars, to be paid to the said judge of probate or his successors in office, and the said Waterman, judge of probate as aforesaid, at a term of the court of probate held at Portland

within and for said county of Cumberland, at the third Tuesday of July, A. D. eighteen hundred and seventy-five, by his decree and order of that date, did expressly authorize the said Mitchell to commence this suit; yet the said defendants, though requested, have not paid the same, but neglect so to do; to the damage of the said plaintiff (as he says) the sum of twenty thousand dollars."

C. W. Goddard, for the plaintiff.

This case has been substantially before the court twice already. *Cleaves v. Dockray*, 67 Maine, 118; *Dockray v. Milliken*, 76 Maine, 517. In the former case it was determined that the bond in suit was a good common law bond and that the action could be maintained in the name of Judge Waterman.

It is true the writ does not allege any authority in the plaintiff to prosecute this suit derived from the order authorizing Mitchell to sue. The allegation in reference to Mitchell is surplusage, an inadvertently retained relic of the former suit.

It is not necessary to allege that the plaintiff had authority from the probate court to prosecute this action, for we no longer claim it to be a statute bond. A common law bond requires no such allegation or proof. The simple consent of the ex-judge to whom the bond was given is sufficient.

Harvey D. Hadlock, for the defendant, cited: *Lee v. Chase*, 58 Maine, 432; *Fay v. Rogers*, 2 Gray, 175; *Groton v. Tallman*, 27 Maine, 68; *Williams v. Cushing*, 34 Maine, 370; *Waterman v. Dockray*, 56 Maine, 56; *Rand v. Rand*, 4 N. H. 267; *American Bank v. Adams*, 12 Pick. 303; *Bennett v. Russell*, 2 Allen, 537; Bacon's Abr. Title, Executors and Administrators B. 2, 2; *Parkman's Case*, 6 Coke, 293; *United States v. Walker*, 109 U. S. 261, and cases cited.

VIRGIN, J. Debt on what purports to be the penal part of a probate bond, executed (with sureties) by the executrix of the last will and testament of James R. Dockray to this plaintiff, described as "judge of probate of wills," and payable to him or

his successor. Instead of craving oyer of the conditions of the bond and pleading thereto, the defendants have demurred to the writ and declaration.

The action is in the name of the obligee, the writ alleging, however, that the "suit is prosecuted by Lewis Pierce, administrator *de bonis non* with the will annexed, of the estate of James R. Dockray."

While an administrator *de bonis non administratis* is understood in general terms to be the successor of the executor, still he derives his title directly from the testator and not from the executor. *Am. Board's Appeal*, 27 Conn. 344. On his appointment there vests in him, as is indicated by his commission and official designation, title only to the unadministered property of the testator, in trust for those to whom it belongs. Therefore, in the absence of any statutory provision to the contrary, he has no recourse against his official predecessor for devastavit or maladministration, the remedy therefor being reserved to the creditors, legatees and distributees directly; the executor being responsible, in general terms, to his successor only for the goods, effects and credits which were of the testator at the time of his decease, and remain unadministered, that is, in specie, unaltered or unconverted by any act of the executor or the proceeds thereof not mixed with the latter's own money. *Potts v. Smith*, 3 Rawle, 361; S. C. 24 Am. Dec. 359; Sch. Exrs. & Admsrs. §§ 408 *et seq.*; Wms. Exrs. 915 *et seq.*; *Beall v. New Mexico*, 16 Wall. 535, 540; *U. S. v. Walker*, 109 U. S. 265. Though in several of the states statutory provisions allow an administrator *de bonis non* to call for a full accounting by his predecessor and resort to an action on his bond. Cases *supra* and notes, and an elaborate note in 24 Am. Dec. 379-390.

There are no such liberal statutory provisions in this state. R. S. c. 64, §§ 20-24; c. 87, §§ 4, 5, 6.

Being confined to the record, we have no means of knowing for what purpose the administrator *de bonis non* is seeking to maintain this action. He is officially interested in the defendant's bond to the amount of the unadministered estate which she holds,

if any, for such property vested in him in trust for those to whom it belongs, legatees or creditors. Being "interested in his official capacity," he had a right to originate a suit on such bond without applying to the judge of probate, provided "his interest has been specifically ascertained" as provided in R. S., c. 72, § 10, and this should be alleged if such preliminary action has been taken; and if not, the action can not be maintained under that section. Nor could he maintain the action under R. S., c. 72, § 15, for no authority by the judge of probate is alleged, which that section makes essential. Nor can the administrator *de bonis non* prosecute the action for Ammi Mitchell, although the latter might. Assuming, therefore, that the defendant's bond is a statute probate bond, the demurrer must be sustained, and the plaintiff may amend his writ and declaration upon payment of costs from the time when the demurrer was filed.

Demurrer sustained.

PETERS, C. J., WALTON, LIBBEY, FOSTER and HASKELL, JJ., concurred.

SAMUEL NASH, in equity, *vs.* GERTRUDE SIMPSON.

Penobscot. Opinion February 6, 1886.

Will. Devise. Equity practice. Partition. Bankruptcy.

A testator devised to his wife as follows: "All my real estate, together with any and all right, title and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire, to remain hers so long as she shall remain unmarried after my decease. But if she shall marry again, then from that time she shall be entitled to, and receive only one-third part of all that remains. It is my desire and will that said real estate shall remain as it is for twenty years, giving all the income thereof to my said wife, but authorizing her, in case of necessity, to sell any part thereof for her support and maintenance during her widowhood" — with no devise over. The widow died without having married again. *Held:*

1. That the widow, by clear and apt words of the will, took a life-estate only.
2. That the contingent authority to sell for her support during widowhood, did not enlarge her estate to a fee, conferring only a power and not property.
3. That the expressed desire of the testator that the real estate "should remain for twenty years," etc., could not affect the alienation of the life-estate nor of the undevised reversion.

78	149
88	99
88	218
78	142
97	108
78	142
98	411
78	142
599	500
78	142
100	541

Between tenants in common, partition is in equity a matter of right and not of discretion, whenever either of them will not hold or use the property in common. Courts of equity, concurrently with courts of law, have jurisdiction of partition of land among tenants in common; and equity jurisdiction was expressly conferred by R. S., (1857) c. 77, § 5, cl. 6, which provision has been incorporated in the subsequent revision.

To entitle a complainant to a decree for partition, he must show a clear, legal title in himself; and when his title is disputed and not established, the bill may be retained to give him a reasonable opportunity to establish it at law. When the complainant claims title under a will and files his bill under the statute for a construction of the will, and for an accounting and partition, the court, in the absence of any defect in his title, having thus acquired jurisdiction for the purpose of construing the will, has authority to do complete justice between the parties by compelling an account and partition. Circumstances stated in the opinion which will warrant holding the bill to allow the complainant opportunity to establish his legal title. The defendant may dispute the complainant's legal title which the latter has conveyed away, though the former does not claim under it.

It seems that the assignee of a bankrupt is not bound to take possession of all property conveyed by the bankrupt in fraud of the bankrupt law.

He may elect to take it or not to take it. If he does not elect to take it within a reasonable time, it is deemed an election to reject it.

BILL IN EQUITY to obtain a construction of the will of Simeon H. Nash, and for an account and partition.

Heard on bill, answer and proof. It appears from the report of the case that Simeon H. Nash died June 24, 1866, and his will contained the devise recited in the head note; that the widow of the testator, Eliza B. Nash, died July 19, 1884; that the complainant was the husband of the daughter of the testator, Abbie W. Nash, and she died November 2, 1874, leaving a will in which she devised her estate to her husband, the complainant; that the complainant conveyed to Francis V. Bulfinch, February 11, 1875, and filed his petition in bankruptcy September 13, 1875, an assignee was chosen, an assignment was made and recorded, and a discharge was granted September 28, 1879; that Francis V. Bulfinch conveyed to James H. Nash, July 18, 1875; and that Jasper H. and Daniel B. Nash conveyed to the complainant July 12, 1883. The bill was dated October 1, 1884.

Davis and Bailey, for the plaintiff, cited: Co. Litt. 42; *Mansfield v. Mansfield*, 75 Maine, 509; *Densin v. Mitchell*, 28 Ala. 360; *Stevens v. Winship*, 1 Pick. 318; *Larned v.*

Bridge, 17 Pick. 339; *Warren v. Webb*, 68 Maine, 137; *Scott v. Perkins*, 28 Maine, 35; *Eaton v. Straw*, 18 N. H. 331; *Burleigh v. Clough*, 52 N. H. 272; *Goodell v. Bigbee*, 1 B. & P. 179; *Hoyt v. Jaques*, 129 Mass. 286; *Paine v. Barnes*, 100 Mass. 471; *Shuw v. Hussey*, 41 Maine, 495; *Hall v. Preble*, 68 Maine, 101; *Ramsdell v. Ramsdell*, 21 Maine, 288; *Stuart v. Walker*, 72 Maine, 146; *Whitcomb v. Taylor*, 122 Mass. 248; *Smith v. Smith*, 10 Paige, 470; *Hanson v. Willard*, 12 Maine, 146; *Nickerson v. Bowley*, 8 Met. 432; *Turner v. Hallowell Savings Inst.* 76 Maine, 530; *Rosher v. Rosher*, 26 Ch. Div. 801; *Wilkin v. Wilkin*, 1 Johns. Ch. 117; *Phelps v. Green*, 3 Johns. Ch. 305; *Hosford v. Mervin*, 5 Barb. 51; *Gay v. Parpart*, 106 U. S. 689; *Wisley v. Findlay*, 3 Rand. 398; *Burleson v. Burleson*, 28 Texas, 383; *Miller v. Warmington*, 1 Jac. & Walk. 473; *Walley v. Dawson*, 2 Sch. & Lef. 367; *German v. Machin*, 6 Paige, 288; *Baring v. Nash*, 1 Ves. & B. 556; *Larkin v. Mann*, 2 Paige, 28; *Wilkinson v. Parish*, *Id.* 653.

F. H. Appleton (*A. L. Simpson* with him), for the defendant, contended that by the will of Simeon H. Nash, the real estate passed to the testator's widow, Eliza B. Nash, in fee, upon a condition subsequent which was never broken, and the defendant being the sole heir of Eliza B. Nash—the daughter of Simeon H. Nash, Abbie W. Nash, having died without issue before her mother—the whole estate descended to her.

The law favors the larger estate. *Fay v. Fay*, 1 Cush. 102. The devise of land conveys all the estate of the devisor therein unless it appears, (*i. e.* made clear) by his will that he intended to convey a less estate. R. S., c. 74, § 16. The testator intended to devise his whole estate to his wife. The words "all my real estate" are sufficient to create a fee. *Bacon v. Woodward*, 12 Gray, 379 and cases cited.

The plaintiff relies upon the words "so long as she shall be, or remain unmarried after my decease" claiming they are words of limitation, restricting the estate devised to one for widowhood, or at best for life, and cites authorities to sustain this

construction. But it will be found after a careful examination of these cases, that not only in all of them was there an express devise over, while in the case at bar there is none, but also, that there is a wide difference between them, in the forms of expression employed. In the case at bar the words used are not words limiting the tenure of the estate, but words of defeasance, defeating the estate, should the condition be broken. "I give and devise . . . all of my real estate, together with any and all right, title and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire." If the will stopped there it would be an absolute devise. "To remain hers so long as she shall be or remain unmarried after my decease." "To remain hers" how? "To remain hers" as devised, as I have given it, in fee. There was no limitation but a condition. 4 Kent Com. (12th ed.) 127; *Otis v. Prince*, 10 Gray, 581; *Parsons v. Winslow*, 6 Mass. 169; 2 Bac. Ab. 291.

This interpretation is confirmed by a further examination of what immediately follows in the will. "But if she shall marry again then, from that time, she should be entitled to receive only one-third part of all that then remains." Now what did the testator intend by this clause, for his intention is the pole-star by which the court must be guided and which must never be lost sight of? He intends to say and does say in substance that if his wife remarries after his decease, she shall have but one-third part of what she would receive if she remained a widow — and yet if the first clause of the devise is construed as a life-estate, by the second clause she would get more — a fee of one-third — if she marries, and this result would not appear to be in consonance with the clearly indicated intention of the testator. 81 N. Y. 356; *Chinn v. Respass*, 1 T. B. Monroe, 25; *McLellan v. Turner*, 15 Maine, 436.

The construction contended for by the plaintiff leads to confusion and inconsistency, while that claimed by the defendant makes the clauses of the devise harmonious and consistent with themselves and the declared intent of the testator.

No presumption of an intent to die intestate as to any part of

the estate is to be presumed if the testator's words will carry the whole. *Stehman v. Stehman*, 1 Watts, (Pa.) 466; *Hunt v. Hunt*, 11 Met. 88.

Counsel further contended that if the complainant had any interest in the estate in reversion it passed to his assignee in bankruptcy, citing: *Belcher v. Burnett*, 126 Mass. 230; *Nash v. Nash*, 12 Allen, 345; *Dunn v. Sargent*, 101 Mass. 336; *Caswell v. Caswell*, 28 Maine, 232; *Fletcher v. Holmes*, 40 Maine, 364.

VIRGIN, J. Simeon H. Nash died testate leaving a widow and two heirs—one a daughter and the other a daughter of a deceased daughter—the defendant.

The complainant claims that by the will of the testator, his widow took only a life-estate in the real estate, and that as the reversion was not disposed of by the testator, the two heirs became tenants in common, each owning an undivided half thereof.

The defendant contends that the widow took a fee; and that as the widow died intestate, the reversion descended to herself as the only surviving heir.

The first question therefore is, what estate did the widow take under the fourth item of the will.

It is common knowledge that the language adopted by the testator—"all my real estate, together with any and all right, title and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire"—would be ample in a devise, without any words of inheritance or limitation, even before any statutory provision relating thereto to carry the fee. And the statute goes still further by providing that, a devise of land conveys all the estate of the devisor therein, unless it appears that he intended to convey a less estate. R. S., c. 74, § 16. The omission from the several subsequent revisions of the word "clearly" next before "appears" in the revision of 1841, c. 92, § 26, does not change the meaning. The inevitable conclusion must therefore be that the widow took a fee, unless it clearly appears by the will that a less estate was intended.

And we are of opinion that the words — "to remain hers so long as she shall be or remain unmarried after my decease" — are words of limitation which clearly show it to have been the intention of the testator to limit the duration, at longest, to the natural life of his widow. They can mean no more than "during widowhood" (*Loring v. Loring*, 100 Mass. 341), and the term must be considered to be measured by the life of a person *in esse*. 1 Wash. R. P. 63. Such and similar phrases have ever since the time of Lord COKE been so construed. *Mansfield v. Mansfield*, 75 Maine, 512 and cases there cited. 1 Wash. R. P. 103; Bac. Ab. 454; *Dole v. Johnson*, 3 Allen, 364.

The last case cited, so far as this question is concerned, is very much like the one at bar. The language of the devise to the widow in that was: "All my real and personal estate, together with any and all estate, right or interest which I may acquire after the date of this will, as long as she shall remain unmarried and my widow." And in that case as in this there was no devise over.

And on the question of intestacy — which consideration has been urged here — the court, after remarking that the preventing of intestacy is an object generally to be sought in the construction of wills, say: "the will does not anywhere profess to dispose of the whole estate; and as to the remainder of his real estate, after the estate for life or widowhood devised to his wife, no disposition is made of it. It is certain therefore that to some extent, it was his intention to die intestate." We may well adopt this language, although general introductory words, such as "touching all my temporal estate" and the like, may have some effect in the construction of subsequent devises, are not of themselves sufficient to extend a devise for life to a fee. 3 Greenl. Cr. 176 and note.

As the widow therefore, by force of the clear, apt and explicit words of the will and not by implication, took a life-estate only, the contingent authority, "in case of necessity to sell any part of the estate for her support and maintenance during her widowhood" does not enlarge her estate to an absolute fee. *Warren v. Webb*, 68 Maine, 137; *Stuart v. Walker*, 72 Maine, 146.

Such authority confers only a power and not property. *Ayer v. Ayer*, 128 Mass. 575; *Burleigh v. Clough*, 52 N. H. 267; *Herring v. Barrow*, 13 Ch. D. 144; *Rhode I. H. Tr. Co. v. Com. N. Bank*, 1 E. Rep. 44. This construction gives full legal force to the language and intention of the testator.

It is urged that the clause — “but if she shall marry again then, from that time, she shall be entitled to receive only one-third part of all that remains,” gives her, in case of marriage, one-third in fee — which would result in giving her a larger estate in quality if she acted against the wishes of her husband than she would receive if she acted in accordance therewith, by remaining unmarried. But we do not so understand it. This clause of itself gives her nothing. It only reduces the quantity of property, in case the contingency happens which was given to her by the former clause which alone contains words of devise. In other words, if she married, she was then only to have one-third of the estate devised for life less what she might dispose of under the power — just what would be equivalent to her dower.

The widow not having married again, we have no occasion to pass upon the question of the restraint of marriage; and if we had, we think the preponderance of authority allows a husband to consider the probabilities whether or not his children would be so well cared for if his widow formed a second alliance and became liable to be the mother of a second family, and govern the disposition of his property accordingly. 1 Jar. Wills, (R. & T. ed.) 564 and note 29. And it seems to be the opinion of the English Chancery court that the same rule applies to widowers as to widows. *Allen v. Jackson*, 1 Ch. D. 399.

Nor can the clause — “It is my desire and will that said real estate shall remain as it is now for twenty years,” &c., have any influence upon the life-estate or upon the reversion — upon the life estate, for the testator could not restrain the alienation even of a life-estate, *Turner v. Hallowell Sav. Inst.* 76 Maine, 527, 530; nor upon the reversion, for it being undevised, its control is not governed by the will. *Nickerson v. Bowly*, 8 Met. 424, 430.

Much stress has been laid upon the alleged real intention of the testator. But his intention, as deduced from the language of the will, is the criterion for its interpretation; and when thus ascertained, it is only to have effect provided it is consistent with the rules of law. *Warren v. Webb*, 68 Maine, 135. And the intention contended for, however plausible it may appear, cannot have effect because the rules of law will not permit. Moreover we think it quite as certain that the testator really intended what the law declares he said: that his widow should not only have the personal property but a life-estate in the real estate with power to sell any of it for her comfort during her widowhood, and in case she married again then what would be equivalent to dower, and the balance to descend to his and her children.

The allegation in the answer, unsupported by any evidence, that the widow did exercise the power given her is not relied upon in the argument.

Our opinion therefore is that by the will the widow took a life-estate, with a contingent power to sell any part of it during her widowhood which power she never exercised; that the reversion, being undisposed of by the testator, vested in his two heirs — daughter and granddaughter — subject to the contingency of the exercise of that power by the widow, or of a sale by his executor for the payment of debts which he did not leave or have been paid (*Rich v. Rich*, 113 Mass. 197, 199); and that the complainant being sole devisee of the daughter, holds under the will, as tenant in common with the defendant, each share being one undivided half.

The plaintiff also seeks for partition of the premises.

Between tenants in common partition is a matter of right and not of discretion, whenever any one of them will not hold and use the property in common. *Parker v. Gerard*, Amb. 236; *Agar v. Fairfax*, 17 Ves. 533; *S. C. White & T. L. Cas.* 516; *Hanson v. Willard*, 12 Maine, 142, 147; *Wood v. Little*, 35-107; *Allen v. Hall*, 50 Maine, 253, 263. And courts of equity, on account of their superior methods and procedure, not only long ago assumed and exercised, concurrently with courts of

law, jurisdiction of partition of land thus held (1 Sto. Eq. §§ 643 *et seq.*) but equitable jurisdiction was expressly conferred nearly thirty years ago. R. S., (1857) c. 77, § 5, cl. 6; *Wilson v. E. & N. A. R. Co.* 62 Maine, 112, 114. Moreover when one tenant has received more than his share of the rents and profits, an accounting may be directed and reimbursement decreed. R. S., c. 77, § 5, cl. 6; *Leach v. Beattie*, 33 Vt. 195; 3 Pom. Eq. § 1389; 1 Sto. Eq. § 655.

To entitle the plaintiff to a decree for partition he must show that his legal title is clear. This expression with very little variation runs down through all the cases and text books. *Cartwright v. Pultney*, 2 Atk. 380; *Parker v. Gerard*, Amb. 231; 1 Sto. Eq. § 653; 3 Pom. Eq. § 1388. One court says—"in a suit in equity for partition, the legal title of the parties is never meddled with by the court. The individual rights of the parties to participate in the division, or to call for it, may come up, but not the simple question of conflicting title to the land. A plaintiff who comes into equity for partition must show a clear legal title." *Stuart's Heirs v. Coalter*, 4 Rand, 74. Some of the authorities say that where there are suspicious circumstances about the legal title, the decree will not be made. *Cartwright v. Pultney*, *supra*. The doctrine almost universally held is that if the plaintiff's legal title is involved in doubt and is disputed and not established—as where it appears that the title depends upon forged deed (*Cartwright v. Pultney*, *supra*); or upon a settlement of a boundary (*Stuart's Heirs v. Coalter*, *supra*); or want of sufficient delivery of a deed (*Nichols v. Nichols*, 28 Vt. 228); and for various other causes (Freem. Cot. & Part. § 502); the court will retain the bill to give the plaintiff a reasonable opportunity to establish his title at law; when he has done that decree partition according to his established right. *Cartwright v. Pultney*, *supra*; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Phelps v. Green*, 3 Johns. Ch. 302; *Ramsay v. Bell*, 3 Ired Eq. 209; *Wisely v. Findlay*, 3 Rand. 361; *Howey v. Goings*, 13 Ill. 95; S. C. 54 Am. Dec. and note.

So there are cases holding that when the title of the parties depends upon the construction of a will that question must first

be settled at law. *Slade v. Barlow*, L. R. 7 Ch. 296; *Manners v. Manners*, 1 Green's Ch. 384. But where the defendant, as in this case, is in possession claiming to hold it under a will and the complainant files his bill under the statute to have the will construed, for accounting and partition; the court, in the absence of any defect in the latter's title, having acquired jurisdiction for the purpose of construing the will, has authority to do complete justice between the parties, by compelling an account and partition. *Scott v. Guernsey*, 60 Barb. 178; *Dameron v. Jameson*, 71 Mo. 105; *Howey v. Goings*, *supra*; *Freem. Cot. & Part.* § 449.

But assuming the parties to have been tenants in common with the right of possession on the decease of the widow, the defendant disputes the present title of the plaintiff on the ground that his conveyance to Bulfinch in February, 1875, was in fraud of the bankrupt law and that the title by virtue of his bankrupt proceedings passed to his assignee who, if anyone, should have brought the bill.

On the other hand the plaintiff contends that the conveyances through Bulfinch and J. H. Nash to himself—the latter more than a year prior to the filing of his bill—made his legal title clear; and that as the defendant does not claim under the assignee, she cannot protrude that title.

We do not understand the rule to be that the defendant cannot raise that question as a defence here, unless she claims under the assignee, although two cases—*Portis v. Hill*, 14 Tex. 69, and *Burleson v. Burleson*, 28 Tex. 382, 413, seem to so hold. For all the other cases which an extended search has enabled us to find hold to the contrary; and the reason assigned in some of them would seem decisive, viz: that while at law partition is effected by the judgment of a court of law and delivery of possession in pursuance of it, equity consummates partition by directing and compelling mutual conveyances by the parties (*Cartwright v. Pultney*, *supra*; *Whaley v. Dawson*, 2 Sch. & Lef. 366; *Gay v. Parpart*, 106 U. S. 679, 690); or by decreeing a pecuniary compensation to one of the parties for owelty (*Wilkin v. Wilkin*, *supra*, 1 Sto. Eq. § 654); or by

ordering a sale of the premises and a division of the proceeds. 3 Pom Eq. § 1390. Therefore to enforce a decree of partition between these parties in any of these modes, especially of the last two named, could not bind persons not parties; and if the assignee's title should subsequently prove good, the defendant would be in an undesirable plight. *Gay v. Parpart, supra*, is in harmony with this view, and contains nothing inconsistent herewith. Moreover the defendant's title being unquestioned, she ought not to be drawn into any litigation concerning any controversy between the plaintiff and some third person as to the plaintiff's title. *Whaley v. Dawson, supra*.

We are therefore of opinion that before partition can be decreed, the plaintiff must establish, by some independent proper suit or action, his legal title.

But since we have settled what we suppose to be the principal contention—the construction of the will, and the parties may, perhaps, feel inclined to save further expense and delay by an amicable arrangement, we add by way of suggestion:

Assuming that the conveyance to Bulfinch, though made some seven months prior to the commencement of the plaintiff's proceedings in bankruptcy, was in fraud of the bankrupt law and that the land vested in the assignee by operation of law—how long does it remain there without being asserted by the assignee? An assignee, unlike an executor of a deceased testator, is not bound to take possession of all property that thus vests in him. It may be onerous property depending upon uncertain litigation. He may elect to take it or not to take it; and if he elects not to take it, then it survives to the bankrupt unless he has disposed of it. Moreover he must elect within a reasonable time; otherwise it is deemed an election to reject it. *Amory v. Lawrence*, 3 Cliff. 523, 535–6 and cases there cited.

Again, by U. S. R. S., § 5057, "No suit either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or right of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

Now the legal title passed to Bulfinch in February, 1875, and thence to J. H. Nash, in July 1875, and both deeds were duly recorded, showing the nominal consideration. Did not the failure of the assignees to move within two years make valid the title of J. H. Nash? *Meeks v. Olpherts*, 100 U. S. 564; *Trimble v. Woodhead*, 102 U. S. 647, 649.

If not arranged, the bill will be retained, so far as partition is concerned, to afford the plaintiff an opportunity, under R. S., c. 104, § § 47 and 48, or some other mode which may be proper, to establish his legal title, when further proceedings will be had according to his established rights.

Bill sustained so far as construction of the will is concerned; but bill retained to allow complainant to establish his legal title, when further proceeding will be had according to his established rights. Question of costs reserved till final decree.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

WILLIAM B. HAYFORD and others

vs.

COUNTY COMMISSIONERS OF AROOSTOOK COUNTY.

Aroostook. Opinion February 6, 1886.

Ways, petitions for. County commissioners. R. S., c 18, § 1. Certiorari. County commissioners have no jurisdiction to lay out a highway under the provisions of R. S., c. 18, § 1, unless the petition therefor describes with reasonable definiteness the places where the proposed way is to commence and terminate.

Where the petition prayed for a "county road leading from New Sweden to Fort Kent by the most direct and feasible route, commencing in New Sweden, at the terminus of the county road and running through townships 16 R. 3, 16 R. 4, 17 R. 4, 17 R. 5, 17 R. 6, Frenchville and Fort Kent, and passing between Cross Lake and Mud Lake," *Held*, that the described way was too indefinite and vague to give the commissioners jurisdiction.

ON REPORT.

78	153
85	309
78	153
87	225

78	153
102	162

78	153
106	130
106	131

Petition for the writ of certiorari to quash the proceedings of the county commissioners of Aroostook in laying out a highway upon the following petition :

"To the honorable county commissioners in and for the county of Aroostook: We, the undersigned, inhabitants of Aroostook county, represent that the public good requires a county road leading from New Sweden (township 15, range 3) to Fort Kent, by the most direct and feasible route: Commencing in New Sweden, at the terminus of the county road, and running through townships 16 R. 3; 16 R. 4; 17 R. 4; 17 R. 5; 17 R. 6; Frenchville and Fort Kent; and passing between Cross lake and Mud lake. And we ask you to view the route, and if found feasible, to lay out said road.

Calvin B. Roberts, and 216 others.

Caribou, Mar. 12, 1880."

Wilson and Woodward, for the plaintiffs, cited: *Com. v. Sheldon*, 3 Mass. 188; *King v. Aroostook Co.* 63 Maine, 567; *Sumner v. Co. Com.* 37 Maine, 112; *Howland v. Co. Com.* 49 Maine, 143; *Pembroke v. Co. Com.* 12 Cush. 351; *Bangor v. Co. Com.* 30 Maine, 270; *Levant v. Co. Com.* 67 Maine, 434; *Lewiston v. Co. Com.* 30 Maine, 19; *P. S. & P. R. Co. v. Co. Com.* 65 Maine, 292; *Rutland v. Co. Com.* 20 Pick. 71; *Monmouth v. Leeds*, 76 Maine, 28; *Lisbon v. Merrill*, 12 Maine, 210.

A. W. Paine, for the defendants.

The granting of the writ on petition for certiorari is a matter of discretion with the court, and will not be granted when there is an apparent error unless injustice has been done or will be done by a refusal. *Levant v. Co. Com.* 67 Maine, 429; *Lapan v. Co. Com.* 65 Maine, 160; *Fairfield v. Co. Com.* 66 Maine, 385; *Hopkins v. Fogler*, 60 Maine, 266.

One reason given for disturbing the proceedings of the commissioners is, "the petition did not sufficiently describe the road prayed for."

The statute provision is that the highway must "lead from town to town," and the petition must be in writing "describing

a way," and the commissioners may act upon it, conforming substantially to the description. R. S., c. 18, § 1.

The object of the way was manifest, and that was to open up a highway connecting the road in Sweden with the town (of course the business part) of Fort Kent. There could be no hesitancy or doubt as to what was meant, and that is all that is wanted. One's common sense could not fail to teach that. The termini are given and the intermediate territory described. What could be more definite or certain as to the way desired by the petitioners? The "general course" is readily settled by fixing the termini. Things are sometimes too plain to admit of argument. Such is the character of the proposition here. The general idea is what is wanted. The starting point and the terminus as a general fact—a road in this case, to accommodate the travel from the south to Fort Kent. The particulars are for the court to settle. There is where the discretion of the court is prayed for.

VIRGIN, J. Generally, the granting or withholding of a writ of *certiorari* for the purpose of bringing up and quashing the irregular proceedings of county commissioners, rests wholly within the discretion of this court. But, as an exception to this general rule, when the commissioners have no jurisdiction in a given proceeding, the court has no occasion to exercise its discretion in the matter, but on due presentation of the record orders the writ at once; for in such a case, the action of the commissioners being without the authority of law, parties aggrieved thereby have the legal right to have the proceedings quashed for the asking. *Fairfield v. Co. Commrs.* 66 Maine, 385; *Levant v. Co. Commrs.* 67 Maine, 429.

Being an inferior tribunal, nothing is presumed in favor of the commissioners' jurisdiction, but it must appear by their record. *State in Cer. v. Pownal*, 10 Maine, 24. A general jurisdiction merely, given by the statute over the subject matter, is not enough; they can only have it in the particular case in which they are called upon to act, by the existence of those preliminary facts which confer it. *Small v. Pennell*, 31 Maine,

267, 270. Moreover, while generally no particular form of words is required in the petition, nor is strict technical accuracy expected therein (*Windham v. Co. Comrs.* 26 Maine, 406, 409), their jurisdiction generally depends upon whether sufficient jurisdictional facts are set out, as they always should be, in the petition which forms the foundation of their action (*Bethel v. Co. Commrs.* 42 Maine, 478); although in some classes of cases concerning which the statute does not prescribe what facts the petition shall set out—such as those seeking an abatement of taxes—if the whole record when completed shows actual jurisdiction, notwithstanding one or more of the jurisdictional facts were wanting in the petition, the court may, if substantial justice has been done by the commissioners, rightfully refuse to grant the writ. *Orland v. Co. Commrs.* 76 Maine, 462.

But in cases involving the laying out of highways by the commissioners, the statute prescribes in part, at least, the character of the petition. It must be a "petition describing a way." Whatever else it may contain, if no way is therein described, it can not authorize any action but dismissal on the part of the commissioners. When and only when a "petition describing a way" is presented to them by persons considered "responsible," the "commissioners may act upon it, conforming substantially to the description, without adhering strictly to its bounds." R. S., c. 18, § 1. Without a "petition describing a way," the commissioners would have no jurisdiction, for they could not "conform substantially to the description." One of the evident objects of the provision requiring a description of the proposed way coupled with the required public notice thereon, is to afford those over whose lands it is to be laid and those whose interests may be affected thereby, such information as will enable them to be heard. Hence it has been the practice in such cases to state at least the *termini* of the proposed way with reasonable and approximate definiteness. Thus, in *Sumner v. Co. Commrs.* 37 Maine, 119, SHEPLEY, C. J., said: "The petition should state the places where the way is desired to commence and terminate, and its general course between them, that all interested may be enabled to judge how far such a way would be useful, and to

what extent their interests might be affected." So in *Howland v. Co. Commrs.* 49 Maine, 146, CUTTING, J., said that the petition "must state its termini and route." We fail to understand how any description which does not contain these elements with substantial definiteness can be called "describing a way" within the intention of the legislature.

It is said that the termini and route are set out in the petition. The way asked for is "from New Sweden to Fort Kent by the most direct and feasible route; commencing in New Sweden, at the terminus of the county road." If there is but one county road in New Sweden and but one terminus thereof in that town, then the starting point may be sufficiently definite. But the petition then continues; "and running through" seven townships specifically named, "and passing between Cross lake and Mud lake." Now assuming that the northern terminus intended was "to Fort Kent" as the petition first asserts and not "through Fort Kent" as it subsequently declares — then the terminus is at best left very indefinite. No one can tell within ten miles the place where "the most direct and feasible route to Fort Kent" would terminate, nor how long the route would be. And it seems that no direct feasible route could be found by running between the lakes named and through all the townships named, for the way as laid does not touch Frenchville. It is evident that no owner of lands in any of the townships could learn from this petition whether or not his lands could be taken or his interests affected. Such a description is altogether too vague and indefinite to answer the requirement of the statute on which the proceeding is attempted to be based.

Moreover this conclusion is sustained by *Pembroke v. Co. Commrs.* 12 Cush. 351, wherein the court quashed the laying out of a highway on a petition which described one terminus as "to the Boston & Plymouth road in Pembroke" when the road alluded to extended a distance of four miles in Pembroke.

We do not mean to be understood as holding that the petition for every short piece of new road must necessarily contain a statement of its termini, *in totidem verbis*, for they may be so otherwise described by their connections with the roads already

made, that they cannot fail to be understood by interested persons owning land and residing along their routes. *Raymond v. Co. Commrs.* 63 Maine, 112. But in ways of this character and dimensions such vagueness as is disclosed in the petition cannot be upheld.

Writ granted.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

SETH PINKHAM vs. HORACE A. GRANT and trustee.

York. Opinion February 23, 1886.

Trustee process. Executor. Payment of legacy before the probate of the will.

When one named as executor in a will, after the decease of the testator, and before the probate of the will and his appointment and qualification as executor, pays to a legatee a legacy given him by the will, the probate of the will and appointment and qualification of the executor relate back by construction to the death of the testator, and validate the payment. The legatee no longer has any legal claim for the legacy.

ON EXCEPTIONS.

Assumpsit on a promissory note in which the only question presented related to the charging of the alleged trustee.

Upon the facts stated in the opinion the presiding justice discharged the trustee and to this ruling the plaintiff alleged exceptions.

R. P. Tapley, for the plaintiff.

The trustee seeks to avoid the plaintiff's attachment by an act done anterior to his appointment. This he can not do. In considering the attempt to thus avoid, it must be noticed that the proceeding is not against him as executor *de son tort*, but is against him as executor *de jure* and by virtue of clear, explicit provisions of statute authorizing it. R. S., c. 86, § 36, and see also *Cummings v. Garvin*, 65 Maine, 301.

When the will was probated and this trustee was appointed executor, he gave a bond that he would thereafter administer the estate according to law. It would be a novel claim that this bond would be held to cover acts done before his appointment

and the giving of the bond. His appointment on the fifth of September could not authorize him to pay on the fourth.

"The executor has no legitimate authority to do any act before the probate of the will except such as are strictly necessary and indispensable, such as providing for the decent burial of the deceased and such as are required to preserve the property of the estate and for the comfortable support of the family,' 3 Redf. Wills, 21.

He can not convey the personal property. He can not sue for and collect debts. *Campbell v. Sheldon*, 13 Pick. 22. Having advanced his own funds to his brother, the defendant, before his appointment as executor, the day before, he made himself the creditor of his brother to that amount and stood in the same relation to him after the appointment. It did not give him a lien on the legacy.

Counsel further contended that the transaction was clearly devoid of good faith, and that it was void as to creditors by the common law. In reply counsel cited: *McKeen v. Frost*, 46 Maine, 249; *Gilman v. Gilman*, 54 Maine, 456; *Pettingill v. Pettingill*, 60 Maine, 411; 3 Redf. Wills, 21.

H. Fairfield, for the trustee, cited: 2 Redf. Wills, 14-16; *Rand v. Hubbard*, 4 Met. 256; *Spring v. Parkman*, 12 Maine, 132.

LIBBEY, J. The exceptions raise the question of the liability of the trustee. The facts upon which the liability depends are, in substance, as follows: Ira Grant died, testate, July 27, 1882. The trustee was named as executor in the will. The testator gave to the principal defendant a legacy of one thousand dollars. On the fourth of September, 1882, the trustee, as executor, paid to the principal defendant nine hundred and twelve dollars in part payment of the legacy, taking his receipt therefor. The will was probated on the fifth of September, 1882, and on that day the trustee was duly appointed and qualified as executor. Afterwards, on the same day, this action was commenced and the writ served on the trustee. By the settlement of the estate in probate, it appears that it is insufficient to pay all legacies in

full, and that the nine hundred and twelve dollars was all that the defendant was entitled to under the will.

It is claimed by the learned counsel for the plaintiff that when the payment was made by the trustee, he had not been appointed executor by the probate court, and had no authority to make the payment; that he made it in his own wrong, and therefore the legacy was due from the estate of the testator when the writ was served.

We think this is not the law. True, when the payment was made the trustee had no legal right to use the funds of the estate for that purpose; but when one named as executor in a will deals with the assets of the estate before his appointment and qualification, without authority, his appointment and qualification date back by construction to the death of his testator and validate his acts, and he can no longer be held as executor *de son tort*. At the time of the service there was nothing due the legatee. *Shillaber v. Wyman*, 15 Mass. 322; *Andrew v. Gallison*, 15 Mass. 325; *Rand v. Hubbard*, 4 Met. 252; *Spring v. Parkman*, 12 Maine, 127; *Alvord v. Murs*, 12 Allen, 603.

It is further claimed for the plaintiff, that, as matter of fact, the payment was not made till after the service of the writ, but we think the case does not warrant such a finding.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, VIRGIN and HASKELL, JJ., concurred.

CHARLES W. TRAINER *vs.* JOHN MORISON and another.

Penobscot. Opinion February 13, 1886.

Agency. Authority of agent. Notice. Bill-head.

An agent who has authority to contract for the sale of chattels, has authority to collect pay for them at the time, or as a part of the same transaction, in the absence of any prohibition known to the purchaser.

Knowledge of this prohibition may be inferred from the circumstances of sale, or from customary usages of trade known to the parties.

Persons dealing with an agent have a right to presume that his agency is general, and not limited, and notice of the limited authority must be brought to their knowledge before they are bound to regard it.

The notice of the limited authority of the agent, in this case, printed at the top of the bill accompanying the goods sold and not seen by the purchasers, is not so prominent as to hold them at fault in not observing it.

ON REPORT.

Assumpsit on the following account :

All bills must be paid by Check to our order, or in current funds at our office. [Red ink.]

TERMS CASH.

BOSTON, OCT. 9th, 1883.

MESS. JOHN MORISON & Co.,

Bought of CHAS. W. TRAINER & CO.

Manufacturers and Dealers in

LUBRICATING, PARRAFINE AND WOOL OILS,

148 & 150 OLIVER AND 93 PURCHASE STREETS.

3 barrels West Va. oil, 150 C. T.					
418-66					
414-64					
412-64	144 24-29 gals. 13 1-2	19	54		
<u>Cartage,</u>			50	20	04
Paid Oct. 24th, 1883.					60
Chas. W. Trainer & Co.				19	44
by H. D. Richardson.					

John B. B. Fiske, for the plaintiff.

The evidence shows that Richardson was not authorized by principal to receive payment.

Richardson, selling by sample, and not intrusted with the possession of goods, not impliedly authorized to receive payment.

An agent employed to make a contract is not as of course to be treated as having an incidental authority to receive payment. Story on Agency, § 98, and notes. *Doubleday v. Kress*, 50 N. Y. 410; *Higgins v. Moore*, 34 N. Y. Ct. of App. 417;

Clark v. Smith, 88 Ills. 298 ; Vol. 10, 1879, U. S. Digest, 620.

An agent employed to negotiate sales by means of samples and on credit is not to be presumed as authorized to receive payment. Vol. 13, U. S. Digest, 742 ; *Greenwood v. Keator*, 9 Ills. App. 183 ; Vol. 14, U. S. Digest ; *McKindley v. Dunham*, 55 Wisc. 515 ; S. C. 42 Am. R. 740 ; Vol. 10, 1879, U. S. Digest, 619 ; *Butler v. Dorman*, 68 Mo. 298 ; Amer. Law Register, Oct. 1884 ; *Chambers v. Short*, 79 Mo. ; *Seiple v. Irwin*, 30 Penn. St. 513.

Agents who are merely employed to sell and who are not entrusted with the custody of the goods, have no implied authority to receive payment. Such agents are canvassers and others employed to solicit orders, agents authorized to sell by sample, and brokers. Benj. on Sales, by C. L. Corbin, § 1095, note ; *Abraham v. Weiller*, 87 Ills. 179 ; *Cupples v. Whelan*, 61 Mo. 583 ; *Law v. Stokes*, 32 N. J. L. 249 ; *Harrison v. Ross*, 44 Super. Ct. 230-236 ; *Baring v. Corrie*, 2 B. & Ald. 137 ; *Korneman v. Manegan*, 24 Mich. 36.

Third parties bound to use reasonable care in dealing with agents. Not allowed to presume authority. Duty of inquiring incumbent upon third parties. Benjamin on Sales, Bennett, § 745 ; Story on Agency, § 133, and notes.

Sending of bill of goods by plaintiff an interception by principal, which should have put defendants on their inquiry, and after it, payment to agent, invalid. *Pratt v. Wiley*, 2 C. & P. 350 ; *Pitts v. Mower*, 18 Maine, 361.

Such sending of bill, with notice "All bills must be paid by check to our order, or in current funds at our office," printed in red ink upon it, notice to defendants not to pay agents, whether defendants saw notice on bill or not. *McKindley v. Dunham*, *sup.*

Davis and Bailey for the defendants, cited : *Kinsman v. Kershaw*, 119 Mass. 140 ; *Putman v. French*, 53 Vt. 402. 1 Chitty, Agency, 284, notes ; Story, Agency, §§ 135, 137-139, 240-249, 443 ; 4 C. & P. 508.

HASKELL, J. Assumpsit to recover the price for merchandize sold. Defense, payment to the plaintiff's agent.

The plaintiff employed an agent to "sell" his goods "by sample." The agent took an order from the defendants for oil, and directed the same forwarded to them, saying that it would arrive by next boat, and that "he came round once a month," when the defendants engaged to pay him. The goods were delivered as agreed, accompanied by a bill, with the words, "all bills must be paid by check to our order, or in current funds at our office," printed in red at the top. In two weeks after the delivery of the oil, the agent called for, and received from the defendants pay for the same, and gave to them a bill receipted in the plaintiff's name by himself, that bore the same notice in red letters that was printed upon the bill sent with the goods. The agent embezzled the collection. The case comes up on report.

The agent contracted a sale of the goods to be delivered, and to be paid for to himself at his next call. The goods were delivered according to the contract, thereby giving the defendants reason to believe, that the agent had authority to contract for their sale. An agent who has authority to contract for the sale of chattels, has authority to collect pay for them (at the time, or as a part of the same transaction), in the absence of any prohibition known to the purchaser. *Capel v. Thornton*, 3 Car. & Payne, 352; *Greely v. Bartlett*, 1 Maine, 173; *Goodenow v. Tyler*, 7 Mass. 36; Story on Agency, § 102.

Knowledge of this prohibition by the purchaser may be inferred from particular circumstances of the sale, or from customary usages of trade with which he is familiar, as well as by direct notice, that the authority of the agent is limited in this particular. Persons dealing with an agent have a right to presume that his agency is general, and not limited, and notice of the limited authority must be brought to their knowledge before they are to regard it. *Methuen Co. v. Hayes*, 33 Maine, 169. A travelling agent, who assumes only to solicit orders for goods to be sold at the option of his principal, as in *McKindly v. Dunham*, (Wis.) 42 Am. Rep. 740, may well be held unauthorized to make collections. So a broker, not intrusted with the article sold, may not be authorized to receive the purchase money. *Higgins v. Moore*, 34 N. Y. 417; *Burring v. Corrie*, 2 B. & Ald. 137; Story on Agency, § 109.

In this case, the agent assumed to complete a contract of sale, specific in its terms, stipulating, that payment was to be made to himself. After the goods had been delivered, he presented for payment a bill, made upon a genuine "bill head" of his principal. He assumed general authority, and no facts are proved, that curtail, or limit it. The plaintiff seeks to charge the defendants with knowledge, that payment was required to be made, according to the terms of the notice in red letters upon the bill sent with the goods. The defendants did not see the notice, nor, taking into consideration the care ordinarily exercised by prudent men, are they at fault for not observing it.

It is not so prominent upon the bill as to become a distinctive feature of it; one that would be likely to attract attention in the hurry of business, and that ought to have been seen by the defendants. It would have been an easy matter for the plaintiff to have inclosed the bill in a letter of advice, calling the attention of the defendants to the fact, that he was unwilling to intrust collections to his agent. *Kinsman v. Kershaw*, 119 Mass. 140; *Putman and Co. v. French et al.* 53 Vt. 402; *Wass v. M. M. Ins. Co.* 61 Maine, 537.

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and FOSTER, JJ., concurred.



MOSES CHESLEY vs. JOHN J. PERRY.

Cumberland. Opinion March 10, 1886.

Indorser of a writ. Officer's return. Evidence. R. S., c. 81, § 7.

The return of the proper officer upon an execution for costs, that he has demanded payment of it from the indorser of the original writ who neglected to pay the same, or to show personal property sufficient to satisfy the same, is conclusive evidence of the liability of the indorser in an action on the case against him, under R. S., c. 81, § 7.

ON exceptions from the superior court.

The case is stated in the opinion.

At the trial the plaintiff put in the defendant's admission that he endorsed the original writ, the record of the judgment, the execution with the officer's return thereon as follows :

"Cumberland, ss. October 5, 1883. I have demanded payment of the within execution of John J. Perry, and he neglected to pay or to show me personal property sufficient to satisfy the within execution. H. R. Sargent, Deputy Sheriff."

The presiding justice directed a nonsuit to be entered, and to this ruling the plaintiff alleged exceptions.

David Dunn, for the plaintiff.

John J. Perry, for the defendant.

The liability of an indorser of a writ in all the revisions of the statute has been based upon the same provisions as they are found in the act of 1821 ; in fact the same language has been retained, word for word. The indorser is "liable in case of the avoidance or inability of the original plaintiff" and not otherwise.

"The undertaking of an indorser of a writ is in its nature conditional, depending on the avoidance or inability of the plaintiff, of which certain statute proof is required, and it is also the collateral undertaking of one man, for the conditional payment of the debt of another." MELLE, C. J., in *Reid v. Blaney*, 2 Maine, 128. Counsel also cited on this point : *Palister v. Little*, 6 Maine, 352 ; *Dillingham v. Codman*, 18 Maine, 75 ; *Wilson v. Chase*, 20 Maine, 385 ; *Thomas v. Washburn*, 24 Maine, 228 ; *Neal v. Washburn*, 24 Maine, 331 ; *Ruggles v. Ives*, 6 Mass. 494 ; Spaulding's Practice, 87.

In this case there was no evidence of avoidance or inability of the judgment debtor, and none could be put in because there was no allegation of that fact in the writ.

HASKELL, J. Case, to recover costs of the defendant, as indorser of a writ.

By the act of 1821, c. 59, § 8, writs in certain cases were required to be indorsed. Under that act, the court held that *scire facias* was the proper and only proceeding by which costs

could be collected from an indorser; but that method required so exact compliance with technical rules of law, that the legislature, in the revision of 1840-41, enacted, c. 114, § 18, that the remedy should be an action on the case, and that a "return upon the execution issued in any such case, by an officer of the county, where said indorser lives, that he had demanded payment of the same of said indorser, and that said indorser has neglected, either to pay the same, or to show said officer personal property *of the plaintiff* sufficient to satisfy said execution, or that he can not find said indorser within his precinct, shall be *conclusive evidence* of the liability of said indorser in said suit." This enactment has been continued without change to the present day. R. S., 1857, c. 81, § 10; R. S., 1871 and 1883, c. 81, § 7. True, the revision of 1857 omits in terms to require a return of the failure of the indorser to show personal property *of the plaintiff*, but does require a return of the failure to show personal property, that is, property that can be taken upon the execution, and property of the plaintiff can only be so taken, so that the meaning of the statute of 1840-41 is retained in the subsequent revisions, and a return of an officer, in the language of these revisions, complies with their requirements, and takes to itself their meaning.

Since the enactment of 1841, no case cited at the bar pretends to hold any other prerequisite necessary to charge an indorser than the provisions of that statute define. The officer's return, upon the execution in evidence, complies in every particular with the terms of the statute, and is conclusive evidence of the liability of the indorser. The defendant admits that he indorsed the writ, and no good reason is shown why he should not abide the terms of his contract.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ.,
-concurring.

ROCKLAND, MT. DESERT AND SULLIVAN STEAMBOAT COMPANY

vs.

ARTHUR SEWALL, administrator.

Knox. Opinion March 15, 1886.

Pleadings. Corporations. Stock subscriptions.

The plea of general issue admits the plaintiff's corporate existence and power to sue.

A subscriber to stock in a corporation, who never took any part in the organization of the corporation, can not be held upon his subscription, when it does not appear that the whole capital named in such subscription agreement, was subscribed.

On exceptions by the defendant which made a "full report of the evidence, writ and pleadings, and the records put into the case a part of the case."

The case is stated in the opinion.

A. P. Gould, for the plaintiff.

C. W. Larrabee, for the defendant.

VIRGIN, J. Assumpsit to recover the par value of ten shares (at \$100 each) of capital stock which the plaintiff alleges the defendant's intestate agreed to take and pay for by executing certain articles of agreement, of November 7, 1878, mutually entered into by him and sundry other persons.

When the plaintiff's evidence was closed, "the case was withdrawn from the jury and submitted to the presiding justice for decision, with the right to except thereto and to have the whole case reported to the law court."

The plea of general issue admits the plaintiff's corporate existence and power to sue. *Ticonic Bank v. Bagley*, 68 Maine, 251.

By the second and third articles of the association executed prior, but with reference to its organization, the parties thereto agreed "that the capital stock of the company, on its organization into a corporation, shall be \$40,000 divided into shares of \$100

each ;" and the "parties to the agreement shall contribute toward the capital such sum of money as they may severally place against their names," etc. The agreement was signed by sundry persons, and by the defendant's intestate as follows: "Edward Sewall, ten shares."

Assuming a fair construction of the agreement to be, that the defendant's intestate thereby agreed to take and pay for, or take and fill ten shares at \$100 each; that the association was duly organized under the general law as contemplated by the stipulations in the articles of agreement; and that the shares thus subscribed were recognized as shares of its stock and the subscribers as corporators or shareholders—still we are of opinion that the defendant's intestate, who never took any part in the organization, can not be held upon his subscription, since it does not appear that the whole capital was subscribed.

The agreement is to take a certain number of shares of the capital stock, and that must have reference to the capital stock fixed in the agreement and subsequently placed at the same sum in the vote of the corporation. "There must therefore have been such a capital stock obtained before the subscriptions could be binding." *Oldtown and Lin. R. R. Co. v. Veazie*, 39 Maine, 571, 577–8. It cannot be presumed that persons agreeing to become shareholders in a corporation with a fixed capital intend to become members of a corporation with a less capital. *Morw. Corp.* 259.

"It is a rule of law too well settled to be now questioned," says SHAW C. J., "that when the capital stock and number of shares are fixed by the act of incorporation, or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made on the share of any subscriber, until the whole number of shares has been taken. This is no arbitrary rule; it is founded on a plain dictate of justice and the strict principles regulating the obligation of contracts. When a man subscribes a share to stock to consist of one thousand shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only five hundred shares are subscribed for, he would be held, if liable

to assessments, to pay a five hundredth part of the cost, besides incurring the risk of entire failure and loss of the amount advanced toward it." *Stoneham B. R. R. Co. v. Gould*, 2 Gray, 278; *Cabot and W. S. B. Co. v. Chapin*, 6 Cush. 50; *Atlantic Cot. Mills v. Abbott*, 9 Cush. 423; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23; S. C. 9 Pick. 187; *Central T. Corp. v. Valentine*, 10 Pick. 142; *N. H. Cent. R. R. Co. v. Johnson*, 30 N. H. 390.

This rule may be changed by a provision in the articles of subscription. Or if a subscriber, with a full knowledge of the want of the requisite amount of subscriptions attend meetings of the corporation and cooperate in such of its acts as could only be properly done on the assumption that the subscribers intended to proceed with the stock partially taken up, he might be estopped from setting up such defence. *Cabot & W. S. B. v. Chapin*, *supra*.

In the case at bar, the defendant's intestate agreed to become responsible for one-fortieth of the cost of the plaintiff's enterprise. There is no evidence that the whole capital stock was taken. If all have paid who subscribed except the defendant's intestate, then the maintenance of this action would oblige him to become responsible for one-thirtieth, which contract he never made.

Exceptions sustained.

PETERS, C. J., WALTON, LIBBEY, FOSTER and HASKELL, JJ., concurred.

BOSTON AND MAINE RAILROAD COMPANY

vs.

COUNTY COMMISSIONERS.

York. Opinion March 15, 1886.

Ways. Damages in locating. Appeals. R. S., c. 18, § 5, 8, 47, 48, 49.

The requirement of R. S., c. 18, § 5, that "if no notice of appeal is presented or pending" at the term of the county commissioners held next after the filing of their return, "the proceedings shall be closed," etc., are modified by § 48, to the extent that when a party has appealed from the decision on

78	169
91	51

location after it has been placed on file and before the next term of the Supreme Judicial Court, "all further proceedings before the commissioners shall be stayed until the decision is made by the appellate court."

The requirements of R. S., c. 18, § 5, relating to the time within which an appeal is to be taken by any person aggrieved at the estimate of damages by the county commissioners, are applicable only when no appeal on location has been taken.

When an appeal is taken from the decision of the county commissioners to lay out a way and prosecuted as provided in R. S., c. 18, §§ 48, 49, the appellant on damages may file notice of appeal within sixty days after final decision in favor of such way.

The phrase "within the time above limited" in R. S., c. 18, § 8, refers, when an appeal on location has been taken, to the time limited in § 47 of that chapter.

ON EXCEPTIONS.

Appeal from the award of damages made by the county commissioners in locating a way. On motion the presiding justice dismissed the appeal as not seasonably taken, and to this ruling the appellant alleged exceptions. The facts are stated in the opinion.

G. C. Yeaton, for the plaintiff, cited: *Dwarris*, Statutes, (2d ed.) 530, 531, 532; *Wilberforce*, Statutes, 318, 330, 331 and cases cited; *Broom*, Legal Maxims, 123; *Bishop*, Written Laws, 154 and cases cited; *Pratt v. R. R. Co.* 42 Maine, 579; *Martin v. Ins. Co.* 53 Maine, 419; *Maxwell*, Interp. Stats. 66, 157, 158; *Sedgw.* Stat. and Cons. Law, 123 *et seq*; *Hardcastle*, Cons. and Eq. Stat. Law, 174 and cases cited; *State v. Cleland*, 68 Maine, 258; *Tracy v. Goodwin*, 5 Allen, 409; *Carver v. Smith*, 90 Ind. 222; *State v. Sturgis*, 10 Or. 58; *Battersby v. Kirk*, 2 Bing. (N. C.) 609; *Sandiman v. Breach*, 7 B. & C. 99; *Swift v. Jewsbury*, L. R. 9 Q. B. 312.

R. P. Tapley, for the defendants.

By stat. 1883, c. 175, incorporated in R. S., c. 18, § 8, an entire and radical change was made in the law relating to these proceedings. Now a party desiring a revision, on damages, must give notice of appeal from the decision of the county commissioners "before the third day of the regular term succeeding that at which the commissioners' return was made."

This notice must be filed with the commissioners. Then a complaint must be made to the Supreme Judicial Court at the first term that is held more than thirty days after the time limited for filing the notice of appeal.

These provisions are specific and must be complied with to give the party a right to a review by the court. It is purely a statutory remedy, and without a compliance with its provisions the estimation of the commissioners must stand. The Supreme Judicial Court has no original jurisdiction over the subject matter.

R. S., c. 18, § 47, in its arrangement in the statute is placed with those provisions relating to ways in "places not incorporated," § 41. Appeals may be taken from such locations, § 44. This section provides for proceedings by petition and not by complaint. It is by petition to be filed within sixty days. Looking at its origin it will be found to have been passed in 1880, c. 218. At the time of its passage all proceedings of this character must be commenced by petition to the county commissioners. It was, it will be perceived, passed three years before the provisions giving the Supreme Judicial Court jurisdiction. It therefore becomes entirely clear that it related to proceedings before county commissioners and to none other. Three years after its passage all authority over the matter theretofore possessed by the county commissioners, was withdrawn from them. Stat. 1883, c. 175. That statute omitted in the enumeration of sections repealed in consequence of the change in the act of 1880. Being unrepealed specifically and not applicable to the class of cases now before the court, the revision commissioner has placed it under the provisions applicable to "places not incorporated," as those provisions were not affected by the act of 1883.

It is said that when there is an appeal on location the way may not be located, and in that event the hearing on damages provided in § 5, would be useless. That is a possibility. So the damages may be so much increased the commissioners will not locate, § 6. In that event the hearing upon the appeal from the location becomes useless.

VIRGIN, J. When county commissioners, on due preliminary proceedings and hearing, decide to lay out a highway, they are required to make a correct written return of their doings, including the amount of damages allowed to each person. R. S., c. 18, § 4.

At their next regular session after the hearing, their return must be filed with their clerk and remain there unrecorded for inspection, and the case continued to their next regular session, § 5.

In the meantime, after their return is filed, and on or before their next regular session, two appeals from their decisions are open to the various parties; one from that on location, and the other from that on damages, as follows: (1) Any party who appeared at the hearing may appeal from their decision on location, § 48; and (2) any person aggrieved by their estimate of damages may appeal therefrom, § 8, both to the Supreme Judicial Court held in the county where the land lies, § 8, 48.

1. An appeal on location must be taken after the return is placed on file, and before the next term of the Supreme Judicial Court, when it may be entered and prosecuted, § 48; and if not then entered and prosecuted, "the judgment of the commissioners may be affirmed," § 49. If then entered and prosecuted, "all further proceedings before the commissioners shall be stayed until a decision is made in the appellate court," § 48.

2. Any person aggrieved by the commissioners' estimate of damages who would appeal therefrom, must "file notice of appeal with the commissioners" at any time after their return is placed on file and before, at the latest, the third day of their next regular term, § 5, 8. And the appeal must be to the next term of the Supreme Judicial Court first held more than thirty days (excluding the first day thereof) after the third day of the commissioners' term above mentioned, § 8; at which term of the court the "appellant shall file a complaint setting forth substantially the facts," § 8. "If no such notice is presented or pending" at the term of the commissioners above mentioned, "the proceedings shall be closed and recorded; and all claims for damages not allowed by the commissioners shall be forever barred," § 5.

Such were the peremptory requirements regulating the taking and prosecuting an appeal on damages in all cases prior to 1880.

In 1880, the legislature enacted a statute therein providing: "When an appeal is taken on the location of a way, petitions for increase of damages may be filed within sixty days after final decision in favor of such way." Stat. 1880, c. 218, subsequently incorporated in the new revision as R. S., c. 18, § 47. When this statute was enacted in 1880, appeals on damages were taken by "presenting a petition for increase." R. S., (1871) c. 18, §§ 5, 6. But by Stat. 1883, c. 175, §§ 1 and 2, "filing notice of appeal," was substituted for "presenting a petition for increase" in §§ 5 and 6, but the corresponding change was not made in the Stat. 1880, c. 218, hence the slight want of harmony in the mode of instituting an appeal for damages in the two classes of cases.

But a more serious incongruity appears between the provisions of R. S., c. 18, §§ 5 and 8, and those of § 47. The former prescribe the only general mode for taking and prosecuting an appeal on damages. As already seen, an appeal under these general provisions must be taken to the first term of the Supreme Judicial Court first held more than thirty days after the third day of the commissioners' session held next after their return is filed; while under the latter, the appellant not being required to file his petition for increase, or its equivalent (notice of appeal) before "sixty days after the final decision in favor of the way," (which decision need not be made until the second term of the court next after the appeal on location was entered, R. S., c. 18, § 49,) it will be impossible for him to "file his complaint," &c., at the term specified in § 8, for that term will have long since passed. Hence a strict construction encounters grave difficulties as to matters of time.

While these somewhat incongruous provisions were enacted at different dates — one in 1880 and the others in 1883 — they were both re-enacted on the same day in the new revision of 1883; and as they pertained to the same subject, though applicable to different circumstances, they were incorporated into the same chapter. And considering all these provisions together, the

intention seems quite obvious, viz.: to change the time when the initiatory steps of appeal from damages shall be taken in case appeal on location is also taken. So that when no appeal on location is taken and hence the fact of the construction of the way has been made certain (unless it shall be prevented by reason of excessive damages, § 6) then that the question of damages, being the only one, shall be determined without delay. But when such an appeal has been taken, then the legislature seems to have deemed it the better policy to relieve a person, whose land is sought to be taken by eminent domain, from what may prove to be useless and expensive action in relation to damages.

In accordance with well established rules of construction, these sections must all stand if possible, unless they are so inconsistent and repugnant that a construction can not be given which shall reconcile them.

Now viewing §§ 5 and 8 as general provisions, applicable to all cases except so far as they may be modified by §§ 47, 48 and 49; and § 47 as special in its terms, and as modifying §§ 5 and 8 only in respect of the time when an appeal on damages shall be entered and prosecuted in case an appeal on location has been taken, and particularizing the provisions with this object in view, it appears:

1. The requirement of § 5, that "if no notice of appeal is presented or pending" at the term of the commissioners held next after the filing of their return, "the proceedings shall be closed," etc., are modified by § 48, that when a party has appealed from the decision on location after it has been placed on file and before the next term of the Supreme Judicial Court, "all further proceedings before the commissioners shall be stayed until a decision is made in the appellate court;" and

2. The requirements of § 8, that the appeal on damages be taken "at any time before the third day of the regular term succeeding that at which the commissioners' return is made, to the term of the Supreme Judicial Court, first held more than thirty days (excluding the first day of the session)" thereafter,

at which term of the court "the complainant shall file a complaint," etc., are applicable only when no appeal on location has been taken; but when such an appeal has been entered and prosecuted under §§ 48 and 49, then the above provisions of § 8 are modified by § 47. So that, in such case, instead of taking any action whatever in relation to damages at the time prescribed and limited in §§ 5 and 8, the appellant on damages may file "notice of appeal" or its equivalent ("petition for increase") "within sixty days after final decision in favor of the way," and his "complaint," at the term of the Supreme Judicial Court, "first held more than thirty days (excluding its first day)" after *that*. Hence that the phrase "within the time limited" in § 8, will refer, in case an appeal on location has been taken to the "time limited" in § 47.

Such a construction gives full force to all the provisions relating to the times for taking and prosecuting appeals from the decisions of the commissioners, both as to location and damages, and carry out what seems to have been the intention of the legislature as indicated by these disjointed provisions. To be sure § 47 can not be in terms incorporated into § 8 without considerable verbal change — which the legislature will probably do if it adheres to the policy as indicated.

Looking at the facts, we learn that the regular sessions of the commissioners in York county are held on the second Tuesdays of April and October. R. S., c. 78, § 6. They made their return on location and damages at their October term, 1883. December 9, 1883, this appellant appealed from their decision on location and also filed "notice of appeal" from their award on damages. The location was sustained and certified by the clerk to them at their October term, 1884. R. S., c. 18, § 49. October 21, 1884, the appellant filed in the clerk's office of the Supreme Judicial Court, its complaint addressed to the January term thereof, which was the first term of that court "held more than thirty days (excluding its first day) after the final decision in favor of the way." Applying the construction given to the

statutory provisions before mentioned, the appellants seasonably complied therewith.

Exceptions sustained.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

WILFORD E. GRINDLE vs. HENRY N. STONE.

Hancock. Opinion March 16, 1886.

Corporations. Liabilities of stockholders. Evidence. Name. R. S., c. 46, §§ 45, 46, 47.

In an action by a judgment creditor of a corporation against a stockholder who has not fully paid for his stock, the plaintiff must bring the case within the provisions of R. S., c. 46, §§ 46, 47, by showing: (1) That he has a lawful and *bona fide* judgment against the corporation "based upon a claim in tort or contract, or for any penalty" recovered within two years next prior to the commencement of this action; (2) that the defendant subscribed for or agreed to take stock in the corporation and has not paid for the same as payment is defined in § 45; (3) that the cause of action against the corporation accrued during the defendant's ownership of such unpaid stock; (4) that the proceedings to obtain the judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the corporation books.

The certificate of organization of a corporation showing that one shareholder took thirteen thousand three hundred and thirty-two and one-third shares of the capital stock of the par value of five dollars, that one hundred thousand shares issued in all and the amount paid in by the stockholders was one thousand dollars in money and ten thousand dollars in land, is *prima facie* proof that such shareholder had not paid in full for his stock, in the absence of any evidence to the contrary.

The fact that a judgment creditor of a corporation took out execution and made seizure and sale thereon of the personal property of the corporation in part satisfaction thereof, does not prejudice his case in an action to collect the balance of his judgment against a shareholder who has not paid for his stock.

In an action on a judgment debt of a corporation against Henry N. Stone of Boston, a shareholder therein, the certificate of organization was signed by Henry N. Stone of Boston. *Held*, that the defendant is the same person who signed the certificate of organization is *prima facie* shown by the identity of name, in the absence of any evidence of another person of that name in Boston.

ON EXCEPTIONS.

The case and essential facts are stated in the opinion. At the trial the presiding justice directed a nonsuit to be entered and the exceptions were to that ruling.

H. A. Tripp, for the plaintiff.

Hale and Hamlin, for the defendant, contended that R. S., c. 46, § § 37-40, do not impose any individual liability upon stockholders in corporations created after 1836, for debts contracted after June 1, 1857, greater than a seizure and sale of their stock. The plaintiff's remedy if any for unpaid capital is by bill in equity.

There was no valid judgment recovered against the corporation because the return on the original writ shows that thirty days' notice was not given. *Abbott's Trial Ev.* 768.

There was no evidence that the execution against the corporation had not been paid. The officer's return showed that he "applied \$40.05 in part satisfaction;" the plaintiff should show that the balance had not been paid.

There was no proof that the defendant was a stockholder at the time the debt was contracted. The mere dates in the accounts annexed to the writ against the company, cannot be evidence in this suit of the dates when they were contracted.

The plaintiff fails to prove that the defendant had not paid for his stock. The only evidence was the certificate of organization and the defendant may have paid into the company much more than the par value of his stock after that.

In suits of this kind all the statute requirements must be strictly complied with. *Morawetz, Corporations*, § § 616, 618, *et seq.*

VIRGIN, J. The plaintiff having, in April, 1883, recovered judgment, on an account annexed, for eight hundred dollars and eighty-six cents, debt and seventeen dollars and eighty-seven cents costs against the Granger Copper Mining Company, and satisfied in part his execution by a levy upon the personal property of the company, seeks by this action a judgment for the

balance thereof against the defendant to whom, it is alleged, the company issued thirteen thousand three hundred thirty-two and one-third shares of its stock which he has not paid for in accordance with R. S., c. 46, § 45.

The action being founded on R. S., c. 46, §§ 46 and 47, the plaintiff must by evidence bring his case within those provisions by showing :

1. That he has a lawful and *bona fide* judgment against the corporation "based upon a claim in tort or contract, or for any penalty," recovered within two years next prior to the commencement of this action ;

2. That the defendant subscribed for or agreed to take stock in the corporation and has not paid for the same as payment is defined in § 45.

3. That the cause of action upon which his judgment against the corporation was founded, was contracted during the defendant's ownership of such unpaid stock ; and

4. That his proceedings to obtain his judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the corporation books.

With proof of such facts the action may be maintained " without demand or other previous formalities," § 47.

What is the proof ?

1. Copies of the writ and record show a judgment in favor of the plaintiff against the corporation recorded at the April term, 1883, on an account annexed ; and this action commenced by writ dated July 30, 1883.

2. The certificate of organization shows that the defendant took thirteen thousand three hundred thirty-two and one-third shares of the capital stock each of the par value of five dollars ; and that of the whole one hundred thousand shares issued, the stockholders paid in one thousand dollars cash and ten thousand dollars in land — leaving the remainder unpaid for. This makes a *prima facie* case of unpaid stock in the absence of any evidence to the contrary. 2 Whart. Ev. § 1284. If the defendant had paid for his, he could have shown it as a defence, and it would have been a full defence, § 48.

3. The account annexed upon which the judgment against the corporation was based, as shown by copy of the writ in that action, accrued between December 9, 1880, and November 14, 1881, or during the defendant's ownership of unpaid stock; and

4. Copies of the writ and record show that the proceedings to obtain the plaintiff's judgment against the corporation, were commenced during the defendant's ownership of such unpaid stock, his ownership shown by the certificate of organization, being presumed to continue until the contrary is shown.

All that is required by the plaintiff to lay the foundation for this action, is a seasonable recovery of the kind of judgment mentioned in § 46. It was not necessary for him to take out an execution on that judgment and take any action thereon as in case of a debt created before 1871. And the fact that he did so and caused a seizure and sale thereon of the personal property of the corporation in part satisfaction thereof, cannot prejudice the plaintiff. That was for the benefit of the defendant. The officer returned the execution satisfied in part, viz: for forty dollars and five cents. If anything more has been paid thereon, the defendant being, as the certificate of organization shows, president of the corporation, will be able to show it at the next trial.

That the defendant is the same Henry N. Stone who signed the certificate of organization, is *prima facie* shown by the identity of the name, in the absence of any evidence of another person of that name in Boston where he is alleged to reside. 3. Phil. Ev. (Cow. Ed.) 1301-2. Laws, Pres. Ev. 248.

Exceptions sustained.

PETERS, C. J., DANFORTH, FOSTER and HASKELL, JJ., concurred.

EMERY, J., having been of counsel did not sit.

JAMES F. SMITH vs. ELIZABETH HODSDON.

Franklin. Opinion March 18, 1886.

Real action. Purchaser pendente lite.

H conveyed to S a parcel of real estate the deed for which was not recorded.

A third person, who had previously levied an execution upon the same real estate, without notice of the unrecorded deed, brought an action against H for the possession of the estate. After that action was entered in court, S recorded his deed. *Held*, that S could be regarded in no other light than as purchaser *pendente lite*.

A purchaser of real estate *pendente lite* is chargeable with notice of the character of the suit, and of the extent of the claim asserted in the pleadings in reference to the title to such real estate, without express or implied notice in point of fact.

As such purchaser, he is bound by any judgment that may have been entered against the party from whom he has derived his alleged title, equally as if he had been a party to such judgment from the beginning. And the litigating parties are exempted from taking any notice of the title so acquired; nor are they obliged to make such purchaser a party to the suit.

ON REPORT.

Writ of entry to recover possession of certain real estate in Industry.

The opinion states the facts.

H. L. Whitcomb, for the plaintiff.

S. Clifford Belcher, for the defendant.

FOSTER, J. For a correct understanding of the question involved in this case, the following statement is necessary.

The source of title to the land in controversy is from Charles H. Dyer, who conveyed it to Joseph H. Hodsdon, April 9, 1872, Joseph H. Hodsdon conveyed it to his wife, Susan J. Hodsdon, September 3, 1875; and upon that day both deeds were recorded. Elizabeth Hodsdon, mother of Joseph H. Hodsdon, claiming to be a prior creditor, and that the sale by her son to his wife was without consideration and fraudulent as to herself, brought suit against her son upon an account annexed for money loaned and advanced to him prior to said conveyance, the writ in said action bearing date March 22, 1878. Judgment thereon was recovered March 17, 1879, and

a levy upon the land in dispute made May 17, 1879, and duly recorded. The son's wife, Susan J. Hodsdon, having obtained a divorce from her husband in the meantime, held possession of the land. The old lady, Elizabeth Hodsdon, being unable to obtain possession otherwise, on September 14, 1880, brought a writ of entry against Susan J. Hodsdon for the land, claiming title and right of possession thereto under and by virtue of her judgment and levy against Joseph H. Hodsdon. During the pendency of this suit Susan J. Hodsdon died, her two heirs were cited in and a guardian *ad litem* appointed by the court; an administrator having been appointed also appeared and was defaulted; and finally on March 28, 1884, judgment was rendered in favor of Elizabeth Hodsdon against the heirs of Susan J. Hodsdon. A writ of possession was issued, and upon April 25, 1884, Elizabeth Hodsdon was given the possession of the premises. The validity of the levy and the title to the land was in issue in that suit.

But Susan J. Hodsdon had, on June 28, 1880, made and delivered a deed of the premises to James F. Smith, the present plaintiff, which deed was not placed upon record, however, till long after the commencement of the real action by Elizabeth Hodsdon against Susan J. Hodsdon, and while that action was pending in court, viz: March 2, 1881. It appears from the docket entries in said action that notice was ordered by the court on Smith at the March term, 1883, and at the September term of that year he appeared in the suit by his attorney; but there is no evidence that judgment was ever rendered against him in that action.

It is under that deed of June 28, 1880, given by Susan J. Hodsdon before the institution of the real action by Elizabeth Hodsdon against her, but not recorded till it had been pending in court some time, that James F. Smith, the plaintiff in this action, claims title and possession against Elizabeth Hodsdon, the present defendant.

We are satisfied that he can not legally maintain this action. The record in this action brought by Elizabeth Hodsdon against her son shows that she was a creditor prior to his conveyance to

his wife by the deed of September 3, 1875. That the conveyance was claimed to be fraudulent as against this defendant appears not only by the act of levying upon the property as that of the son, but also in the fact of the suit subsequently brought against the wife for its recovery. The judgment in that suit conclusively settled the title and right of possession as being in and belonging to the plaintiff in that action, Elizabeth Hodsdon, as against the party to whom the son had conveyed it. That judgment, based upon the allegation of title and right of possession, is held to conclude all parties and privies thereto in representation or estate. *Gilman v. Stetson*, 18 Maine, 428; *Hurd v. Coleman*, 42 Maine, 182.

But it is urged that this plaintiff holds his title unaffected by that judgment, by deed from Susan J. Hodsdon who had the record title. To this it may be answered: (1) This plaintiff's deed, although given before, was not recorded till after the commencement of the real action in which this defendant claimed title to the land; and by R. S., c. 73, § 8, "No conveyance . . . is effectual against any person, except the grantor, his heirs, and devisees, and persons having actual notice thereof, unless the deed is recorded" as therein provided. Elizabeth Hodsdon was not one of those embraced within the exception named in the foregoing statutory provision. Nor is it claimed that she had notice of that conveyance prior to the commencement of her suit in which her title to the land was established. If such claim were relied on, it would be incumbent on the party asserting such notice to establish that fact. In *Spofford v. Weston*, 29 Maine, 140, the court held that it was for the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, to prove that the latter had actual notice or knowledge of such deed. None is attempted to be shown in this case. Here both parties claim title through different channels from a common source. This deed, then, unrecorded, could not be effectual against the plaintiff in that suit — the defendant in this. It was recorded during the pendency of proceedings in which the plaintiff therein established her title to these premises. Hence, (2) This plaintiff can be regarded in no other light than as a purchaser

pendente lite. As such he would be held chargeable with notice of the character of the suit and of the extent of the claim asserted in the pleadings in reference to the land, even without express or implied notice in point of fact. This rule is founded in necessity and is salutary in its operation, for it would be almost impossible to terminate any suit successfully if alienations were allowed to prevail during its pendency. This principle has long been established, and is explicitly laid down by Lord Justice TURNER in *Bellamy v. Sabine*, 1 De G. & J. 584. And although he was notified that he might appear in that suit, when the fact became known from the records that he claimed title under the defendant in that action, yet such notice was unnecessary. His deed did not become effectual, so far as affecting the rights of the plaintiff in that action, till after the commencement of proceedings by her to establish her title to the land in controversy. As such purchaser during the pendency of that action, he is bound by any judgment that may have been entered against the person from whom he derived his alleged title, equally as if he had been a party to it from the beginning. *Tilton v. Cofield*, 93 U. S. 168. "The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit." 1 Story Eq. § 406, 1 Wash, R. P., *593, *594. This rule is held to be founded upon great public policy; otherwise alienations made during the pendency of a suit might defeat its whole purpose, and there would be no end to litigation. This doctrine is common to the courts both of law and equity, as was held in the case of *Bellamy v. Sabine*, *supra*, and is thus expressed by a learned writer: "In actions of ejectment, if the plaintiff recovers a judgment against the defendant, he has also a perfect title against any alienee of the defendant, since he must necessarily recover upon the strength of his own legal title; in other words, the defendant can never give to an assignee or alienee a better title against the plaintiff than that which he himself holds." 2 Pom. Eq. Juris. § 633.

Therefore, while it may be true that this plaintiff was not a party to the judgment in the former suit, it is equally true that, in his relation to the subject matter of that suit, he has no rights,

as against this defendant, superior to those of his grantor. In that suit the plaintiff there was the prevailing party. So long as that judgment stands unreversed it must be considered as conclusive and importing absolute verity. The plaintiff is not in a position to impeach that judgment in this action. *Blaisdell v. Pray*, 68 Maine, 272.

Another objection raised by the plaintiff is, that the certificate of the oath administered to the appraisers in the defendant's levy, was not made upon the back of the execution. If this objection is now open to the plaintiff, — if the judgment in the former suit may not be conclusive upon that question, — still it cannot avail him in this. While admitting the correctness of the decision in the case of *Hall v. Staples*, 74 Maine, 178, that the certificate of oath must be upon the back of the execution, nevertheless in this case, from an inspection of the original papers, we think that there is a substantial compliance with the requirements of the statute in that respect.

In accordance with the agreement in the report the entry must be,

Plaintiff nonsuit.

PETERS, C. J., WALTON, VIRGIN and LIBBEY, JJ., concurred.

HASKELL, J., concurred in the result.

WILLIAM M. BEAN vs. GEORGE A. BACHELDER.

Penobscot. Opinion March 22, 1886.

Deed. Plan. Survey.

When a plan has been made to delineate an actual survey upon the surface of the earth, and a deed describes the lot by its number "according to the plan," the actual survey rather than the plan fixes the location and boundaries of the lot.

ON EXCEPTIONS.

Trespass *quare clausum*. The plaintiff was the owner of lot number four and the defendant was the owner of lot number five, range three in Greenfield. The question in controversy involved the location of the line between those two lots. The

78	184
91	188
78	184
96	196

verdict was in favor of the plaintiff and the defendant alleged exceptions to the ruling stated in the opinion.

Davis and Bailey, for the plaintiff, cited: *Williams v. Spaulding*, 29 Maine, 112; *Heaton v. Hodges*, 14 Maine, 66; *Thomas v. Patten*, 13 Maine, 329; *Esmond v. Tarbox*, 7 Maine, 61; *Pike v. Dyke*, 2 Maine, 213.

A. W. Paine, for the defendant.

The case involves the construction of these words in the defendant's deed: "Lot No. 5 in the 3rd range in Greenfield according to Herrick's plan." That was the only description.

In removing any and all doubt as to the true meaning of the description, our first recourse is to the rule, which all the authorities confirm, that the meaning must be derived or established by the language of the deed itself. No extraneous aid can be called in except in the single case of latent ambiguity. Here there is none such and the rule must have its legitimate course. This rule itself settles all doubt and all question.

A second rule applicable to this case is so well established as to admit of no doubt, that where a plan is mentioned to establish or help define the premises conveyed, it becomes a part of the deed.

The plan not only makes a part of the deed but a controlling part and is as if incorporated into it, a part of its very corpus, not only establishing lines, but conditions, restrictions and appurtenant rights not even alluded to in the deed. Such cases as *Bartlett v. Bangor*, 67 Maine, 460; *Farnsworth v. Taylor*, 9 Gray, 162; *Boston W. P. v. Boston*, 127 Mass. 374, are very impressive illustrations of our position.

Counsel further cited: *Lincoln v. Wilder*, 29 Maine, 169; *Davis v. Rainsford*, 17 Mass. 207; *Allen v. Allen*, 14 Maine, 387; *Walker v. Boynton*, 120 Mass. 349; *Baxter v. Arnold*, 114 Mass. 577; *Magoun v. Lapham*, 21 Pick. 135; *Erskine v. Moulton*, 66 Maine, 276; *Stewart v. Davis*, 63 Maine, 539; *Wellington v. Murdough*, 41 Maine, 281; *Loring v. Norton*, 8 Maine, 61; *Eaton v. Knapp*, 29 Maine, 120; *Props. Ken. Pur. v. Tiffany*, 1 Maine, 219; *Chesley v. Holmes*, 40 Maine,

546; *Murdock v. Chapman*, 9 Gray, 158; *Morgan v. Moore*, 3 Gray, 321; see also: *Ames v. Hilton*, 70 Maine, 36; *Knowles v. Toothaker*, 58 Maine, 172; *Brown v. Gay*, 3 Maine, 126.

The following cases are not in conflict; it is a different thing to have a plan simply "referred to"; here the conveyance was "according to the plan"; *Pike v. Dyke*, 2 Maine, 213; *Ripley v. Berry*, 5 Maine, 24; *Esmond v. Tarbox*, 7 Maine, 61; *Heaton v. Hodges*, 14 Maine, 66; *Thomas v. Patten*, 13 Maine, 329; *Williams v. Spaulding*, 29 Maine, 112.

In other states and courts the principle now contended for is uniformly recognized. *Dodd v. Burchell*, 1 Hurlstone & C. 113; *R. R. Co. v. Skinner*, 9 Mo. 189; 49 Mo. 100; *Twogood v. Hoyt*, 42 Mich. 609; *Augustine v. Brett*, 15 Hun. 395; *Powers v. Jackson*, 50 Cal. 429; *Doe v. R. R. Co.* 67 N. C. 413; *Roberts v. Robertson*, 53 Vt. 690; *Noonan v. Lee*, 2 Black, 499; *M'Iver v. Walker*, 4 Wheat. 444.

EMERY, J. The defendant claimed under the earlier deed, which contained the description "Lot No. 5, in the 3d range in Greenfield, according to Herrick's plan." Herrick had surveyed the south half of the town into lots and ranges, the north half having been previously surveyed into lots and ranges by another surveyor. Herrick then made a plan of the surveyings of the whole town, which plan was in the case. The defendant's lot was in the south half that had been surveyed by Herrick.

The jury were instructed in effect, the lines run by Herrick upon the surface of the earth, as and for the boundaries of lot five would still be the boundaries of that lot, if their locality could be found, that the question for them to decide was, the locality upon the surface of the earth of the lines actually run by Herrick in making the survey of that lot.

The instruction was correct. *Esmond v. Tarbox*, 7 Maine, 61, is express authority for it. See also *Pike v. Dyke*, 2 Maine, 213; *Williams v. Spaulding*, 29 Maine, 112. The plan was merely a picture. The survey was the substance. The plan was not made to show where the lots were to be hereafter located, or how they were to be hereafter bounded. It was

made as evidence of where they had before been located and bounded. The lot actually surveyed, bounded by the lines actually run, was the lot intended to be conveyed. The plan was named in the deed, rather as a picture indicating the location and lines of the lot. Still the actual boundaries, rather than the pictured boundaries were to be sought for. The picture might not be wholly accurate.

The defendant's counsel urges that the words of the deeds in the cases cited, are merely of "reference to the plan," which he claims, simply indicate the relative location of the lot without attempting to define the boundaries. He claims that the language of his deed being "according to the plan," does undertake to define the boundaries and to limit them to the plan. In *Esmond v. Tarbox, supra*, it does not appear that the language was of reference merely. Such language however, has full as much force. There is no difference in the effect. *Lincoln v. Wilder*, 29 Maine, 179; *Erskine v. Moulton*, 66 Maine, 276.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

ELVIRA G. GREGORY vs. MELVILLE J. GREGORY,

Penobscot. Opinion March 27, 1886.

| 78 187 |
| 1100 337 |

Divorce. Decrees of other state courts.

Courts of other states have no authority to decree a divorce between citizens of this state.

The courts of this state are not bound by the findings of courts of other states upon the jurisdictional question of residence of the parties.

ON EXCEPTIONS.

Action of dower. The defense set up a loss of dower by the divorce of the plaintiff's husband from her granted by the Recorder's Court of Chicago, Illinois, in 1870.

It was ruled by the court that if the husband really obtained a domicil in Illinois as a foundation for the divorce, it would be a valid divorce, although he went out of the state to obtain a domicil in order to obtain a divorce; that the motive for obtain-

ing a new domicil would be immaterial; but that if he went off to be gone only temporarily, in order to acquire a divorce, not really and actually renouncing his domicil here, or gaining another elsewhere, his wife having her domicil here all the time, then there was no domicil or jurisdiction in Illinois, and in such case the divorce was fraudulently obtained, and it would not be a defense to the claim of dower in the present action, and this general instruction was amplified in several ways.

But the defendant contended that even if only a temporary or conditional and not a real domicil was the ground of jurisdiction for the divorce, in the manner before recited, still that the divorce was valid unless it was obtained for some cause or alleged causes which occurred in this state while the parties lived in this state, or for some cause or alleged cause which would not authorize a divorce in this state; and the defendant requested such a ruling. The court declined to give such an instruction or ruling, and the defendant excepted thereto.

Burker, Vose and Barker, for the plaintiff, cited: 10 Mass. 497; 1 Bouvier's Law Dict. 443; Browne, Dom. Rel. 66; *Tolen v. Tolen*, 2 Blackf. 407; *Jenness v. Jenness*, 24 Ind. 355; *Ewing v. Ewing*, 24 Ind. 468; *Hood v. State*, 26 Am. R. 24; *Litowich v. Litowich*, 27 Am. R. 145; *Gettys v. Gettys*, 31 Am. R. 637.

Josiah Crosby, for the defendant, contended that the Chicago court had jurisdiction of the libel for divorce brought by the plaintiff's husband against her, that the finding of that court upon the jurisdictional fact of the residence of her husband in Chicago was conclusive and binding upon the court here, and that, therefore, the divorce was valid and binding though the only evidence of it was the certificate, granted at the time which did not recite the cause, the record having been destroyed in the Chicago fire and the libellant having deceased.

Counsel cited: *Hunt v. Hunt*, 28 Am. R. 136 (72 N. Y. 217); *Mills v. Duryee*, 3 U. S. (Lawyer's C. P. Co. ed.) 412, note; S. C. 7 Cranch, 481; *Zepp v. Hager*, 70 Ill. 223; *Craft v. Clark*, 31 Iowa, 77; *Westcot v. Brown*, 13 Ind. 83; Cooley's

Con. Lim. (5th ed.) 493; *Penobscot R. R. Co. v. Weeks*, 52 Maine, 464; Cooley's Con. Lim. (2 ed.) 17 note, 403, 404, 407; *Harding v. Alden*, 9 Maine, 140; *Hood v. Hood*, 11 Allen, 196; *Hood v. Hood*, 110 Mass. 463; *Hood v. State*, 26 Am. R. 24; *Hawkins v. Ragsdale*, 44 Am. R. 483; *Roth v. Roth*, 44 Am. R. 81; *Buffum v. Stimpson*, 5 Allen, 591; *Bissell v. Wheelock*, 11 Cush. 277; *Holmes v. Holmes*, 63 Maine, 420; U. S. Constitution.

EMERY, J. Marriage is a civil status. The rights and obligations of the parties are not merely contractual, but are fixed, changed or dissolved by law. In case of a conflict of laws, the *lex domicilii* controls the status of the person, though his contractual or property rights may be subject to other laws. The state has the absolute right to determine or alter the civil status of all its inhabitants. No matter where they may temporarily be, and no matter where the contracts or acts giving rise to such status may have been made or done. Other states or countries will in this matter accept without question the decrees of the courts of the home state. *Harding v. Alden*, 9 Maine, 140; *Gregory v. Gregory*, 76 Maine, 535, and cases cited.

But the state has this power only over its own inhabitants. The mere presence within its territory of the inhabitants of other states gives it no authority to fix or change their status. The state of their residence still retains its control over that. It alone can free its citizens from marital obligations. Any proceedings of another state to that end will be ineffectual and will be disregarded elsewhere. *Gregory v. Gregory*, *supra*, *Sewall v. Sewall*, 122 Mass. 156; *Gettys v. Gettys*, 31 Am. R. 637; R. S., ch. 60, sec. 10.

In this case the marriage was in this state and both parties to it were for a time inhabitants of this state. The defendants allege that their ancestor, the husband, was effectually divorced in Illinois. They produce a copy of a decree for such a divorce upon the libel of the husband, made in the proper court of Illinois, which decree we may admit for the purposes of this case is regular and effectual, if the husband was at the time an inhabitant of the state of Illinois.

Was he then an inhabitant of that state? The Illinois court found and declared that he was. The defendants say that finding is conclusive, that it cannot be questioned by our court. They rely upon the U. S. Constitution, Art. iv, sec. 1, requiring full faith and credit to be given in each state to the judicial proceedings of every other state.

It has been well settled however by judicial construction, that the constitutional provision above quoted, only applies when it appears that the court, whose judgment is invoked, had jurisdiction in fact. The clause quoted does not make a court's own declaration of its jurisdiction binding on the courts of other states. One court cannot by a simple *ipse dixit* compel other courts to yield jurisdiction. It has been repeatedly held therefore, that a court's jurisdiction can always be inquired into even against the express recitals and findings of the court. *Thompson v. Whitman*, 18 Wall. 457; *Pennoyer v. Neff*, 95 U. S. 714; *Sewall v. Sewall*, 122 Mass. 156; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30.

In the case at bar, the residence of the husband at the time was the one fact which would uphold or defeat the jurisdiction of the Illinois court. The judge declined to be bound by the recitals of the Illinois court, and submitted the question of residence to the jury, instructing them, that if the husband was not an inhabitant of Illinois at the time, the Illinois decree of divorce was invalid. The judge did, rightly and the instruction was correct.

If the Illinois court had no jurisdiction over the status of the husband Gregory, by reason of his non-residence in that state, he being an inhabitant of this state, that court could not effectually make any decree of divorce for any cause. Its decree for whatever cause would be void for want of jurisdiction over the person of the libellant. The requested instruction was therefore properly refused.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

INSURANCE COMPANY OF NORTH AMERICA vs. WILLIAM ROGERS.

Sagadahoc. Opinion April 7, 1886.

Marine insurance. Premium. Continuation clause. Over insurance.

An action may be maintained for the *pro rata* premium under the continuation clause of a marine insurance policy, when the vessel was at sea at the expiration of the term of insurance, though a previous action had been brought on the premium note and judgment therefor had been rendered in such action. In an action for the premium due upon a marine insurance policy, which was in the name of a part owner for the benefit of whom it may concern, the defendant presented evidence of other insurance, which made an over insurance upon his part of the vessel, and claimed to be liable, if at all, for only a ratable proportion of the premium. *Held*, that if this proposition is sound in law, the burden is on the defendant to show that the policies were simultaneous, and not intended to cover the interests of other owners.

ON REPORT.

The opinion states the case.

Wm. E. Hogan, for the plaintiff, cited: *Cole v. Union Insurance Co.* 12 Gray, 501; *Gookin v. N. E. Ins. Co.* 12 Gray, 501; *Wood v. N. E. Mar. Ins. Co.* 14 Mass. 36; *Bowen v. Merchants Ins. Co.* 20 Pick. 275; *Merchants Ins. Co. v. Clapp*, 11 Pick. 56.

C. W. Larrabee, for the defendant, cited: 2 Marshall, Insurance, c. 15; 1 Marshall, Insurance, § 4; Arnould, Insurance, 296, 302 (2 ed.); *McKim v. Phoenix Ins. Co.* 2 Washington C. C. 89; *Murray v. Ins. Co. Penn.* 2 Washington C. C. 186; *Wiggin v. Suffolk Ins. Co.* 18 Pick. 153.

The only evidence in writing of the defendant's promise to pay was the note on which suit was begun after the end of the voyage. The contract was entire and not divisible, and for one consideration. The plaintiff, having brought suit and recovered judgment on the premium note, has made his election and must abide by his choice. See *Wiggin v. Suffolk Ins. Co. supra*. The plaintiff cannot have two actions on the same debt.

LIBBEY, J. On the 25th of May, 1882, the defendant procured of the plaintiff insurance on the ship Levi C. Wade, valued at forty-eight thousand dollars, in the sum of six thousand five hundred dollars, for one year from April 28, 1882, payable to himself and whom it might concern. The policy contained the usual clause in marine policy as follows: "If on a passage at the end of the term, the risk to continue at *pro rata* premium until twenty-four hours after arriving at port of destination, but no longer, either on hull or freight, and in case of loss under this clause, three months additional premium is warranted by the insured."

The ship sailed from San Francisco, April 25, 1883, for Liverpool, and arrived September 18, 1883.

The defendant gave his note for the premium for one year, which was indorsed by the plaintiff, and judgment recovered on it by the indorsee in 1885.

This action is to recover a *pro rata* proportion of premium from April 28, 1883, to September 19, 1883.

By the terms of the policy the defendant was insured during that time for a *pro rata* premium, and accepting the policy with that clause he must be held as promising to pay the premium. He certainly cannot hold the insurance without promising to pay the consideration for it.

But it is claimed in defence that the defendant owned only twenty-seven sixty-fourths of the ship and had on her a further insurance in another company for the sum of sixteen thousand five hundred dollars making in all twenty-three thousand dollars, while his interest in the value of the ship was only seventeen thousand two hundred and fifty dollars, and that there being an over insurance of five thousand seven hundred and fifty dollars in case of loss he could recover only a ratable proportion of the policies, and therefore is liable for only a ratable proportion of the premium. If this proposition is sound in law, the burden is on the defendant to prove that the policies were simultaneous. This he fails to do. Again, the insurance was on the *ship*, and not on the defendant's interest only, for the benefit of the defendant and whom it might concern. It does

not appear that it was not intended to cover the interest of some other owner as well as that of the defendant.

*Judgment for plaintiff for \$179.50 with
interest from date of the writ.*

WALTON, DANFORTH, VIRGIN, FOSTER and HASKELL, JJ.,
concurring.

STATE OF MAINE vs. JAMES M. BUCK.

Kennebec. Opinion April 7, 1886.

Indictment. Intoxicating liquors. License.

In an indictment for maintaining a liquor nuisance, the fact that the defendant used a building for the illegal keeping and sale of intoxicating liquors was averred, with time and place, in the usual manner; but the allegation that he thereby rendered himself guilty of keeping a nuisance was made with the blank space for the time left unfilled. *Held*, that the indictment contained a legal and sufficient statement of the time when the offense was committed.

On exceptions from the superior court.

An indictment for keeping a liquor nuisance. Verdict, guilty.

The exceptions were to the ruling of the court in overruling a motion in arrest of judgment.

(Indictment.)

"State of Maine. Kennebec, ss. At the superior court, begun and holden at Augusta, within and for the said county of Kennebec, on the first Tuesday of December, in the year of our Lord one thousand eight hundred and eighty-four.

"The jurors for said state, upon their oath present that James M. Buck, of Augusta, in said county of Kennebec, at Augusta, in said county of Kennebec, on the third day of September, in the year of our Lord one thousand eight hundred and eighty-four, and on divers other days and times between said day and the day of the finding of this indictment, a certain building occupied by the said James M. Buck as a saloon, situated on Water street, in said Augusta, unlawfully did use for the illegal keeping and illegal sale of intoxicating liquors.

"And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said James M. Buck, in said county of Kennebec, on the said day of _____ in the year of our Lord one thousand eight hundred and eighty-four, and on divers other days and times between said day and the day of the finding of this indictment, unlawfully did keep and maintain a common nuisance against the peace of said state, and contrary to the form of the statutes in such case made and provided."

W. T. Haines, county attorney, for the state, cited: *State v. Lang*, 63 Maine, 215; Whart. Crim. Law, § 622; *Com. v. McKenney*, 14 Gray, 1..

H. M. Heath, for the defendant.

If an allegation has reference to the day of the finding of the indictment and not to the time of the offense, the indictment is insufficient. *State v. Thurstin*, 35 Maine, 206.

In *State v. Baker*, 34 Maine, 52, the allegation of time was "on or about" a specified day and it was held insufficient.

In *State v. Jackson*, 39 Maine, 291, two different dates were alleged in the indictment and all subsequent averments as to time were introduced by the use of the words "then and there," and it was held insufficient as it was uncertain to which time the word "then" would refer, citing *Jane v. State*, 3 Mo. 61. . .

In *State v. Hurley*, 71 Maine, 354, the court say, "where more times than one have been mentioned in the indictment, it is not sufficient to use the words 'then and there,' because it is uncertain to which of the times previously named they refer," citing 1 Bish. Crim. Pro. (2d ed.) § 414; *State v. Hill*, 55 Maine, 365. The same reasoning would apply when the words "said day" have been used following allegations of more times than one, as in the case at bar. It is uncertain whether the third day of September or first Tuesday of December is referred to.

In *State v. Day*, 74 Maine, 220, the foregoing cases are cited and approved.

The defective allegation in the indictment under consideration is found in what is properly the statement of the offense. What precedes it is only introductory and descriptive of the place.

WALTON, J. The defendant has been tried on an indictment charging him with keeping a liquor nuisance, and found guilty by the verdict of the jury. He moves in arrest of judgment on the ground that the indictment contains no definite allegation of the time when the offense was committed.

An examination of the indictment discloses the fact that one of the blanks intended for a date is left unfilled. But this blank is in that portion of the indictment which characterizes the defendant's act and declares that it rendered him guilty of keeping a nuisance. The fact that he used a building for the illegal keeping and sale of intoxicating liquors is averred, with time and place, in the usual manner. But the allegation that he thereby rendered himself guilty of keeping a nuisance is made with the blank space for the time left unfilled.

It is the opinion of the court that the whole averment is immaterial and might have been left out without impairing the indictment. It has no other effect than to notify the court of the legal consequences of the act already stated; and of this the court would take judicial notice without the averment. It does not state a traversable fact, and being wholly immaterial, the omission to affix to it a date is unimportant. Besides, the date is certain without being stated. It is the illegal use of the building that constitutes the nuisance, and when the time of the former is stated, the time of the latter is made certain; for they are in point of time necessarily contemporaneous.

It is therefore the opinion of the court that the indictment does contain a legal and sufficient statement of the time when the offense was committed. *Exceptions overruled.*

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

NICHOLAS HANSON, in equity, vs. HENRY M. BREWER and others.

Cumberland. Opinion April 7, 1886.

Will. Executor. Equity.

A testator in his will authorized the executor to make such conveyances and disposition of his estate, as should, in the opinion of the executor, be

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necessary to carry into effect the provisions of the will. *Held*, that such a power vests in the executor an authority to sell, limited only by his own judgment of what is necessary to carry into effect the provisions of the will, and by necessary implication it also vests in him the legal title.

Equity can not lend its aid to an effort knowingly and intentionally made to discourage and prevent purchasers from completing their purchases of such an executor.

On exceptions and report.

Bill in equity. The exceptions were to the ruling of the court in overruling a demurrer to the bill. After testimony was taken the presiding justice being of the opinion that the questions of law involved in the suit were of sufficient importance, with the consent of the parties, reported the case to the law court. The essential facts are sufficiently stated in the opinion.

S. C. Strout, H. W. Gage and F. S. Strout, for the plaintiff.

Under the provisions in the will, this estate vested in fee in the devisees, as tenants in common, subject only to be divested if the power of sale should be exercised under circumstances justifying it. The courts incline to treat the estate as vesting in the heirs or devisees, (who are identical in this case,) where there is no direct devise to trustees, unless the duties imposed upon the trustees (in this case the executors) are such as require them to be seized of the legal estate in order to execute their trust. *Deering v. Adams*, 37 Maine, 265; *Perry on Trusts*, § 511 a.

A devise to the executor to sell gives a power coupled with an interest; but a devise directing executors to sell confers a power, without interest, and the fee vests in the devisees. *Fay v. Fay*, 1 Cush. 105; *Shelton v. Homer*, 5 Met. 462; *Larned v. Bridge*, 17 Pick. 339; *Sugden on Powers*, p. 106-111; 2 Burr, 1027; *Bergen v. Bennett*, 1 Caines' Ca. 16; *Hill on Trustees*, 236, 471; *Perry on Trusts*, § § 250, 251, 765.

A direction to "divide" would not imply a power of sale. *Perry on Trusts*, § § 765-766; *Taylor v. Benham*, 5 How. 269.

It follows that unless the power given in this will is legally executed, the title to the land was in the devisees, Smith's children. *Hill on Trustees*, 472; *Perry on Trusts*, § 765.

As the executor was not charged with any duty in managing the real estate, even if the legal estate had been in him, it would have been a dry trust, which under the statute of uses would be executed in the *cestuis que use*, and the title would be in them, subject to the power. Perry on Trusts, § § 520-521; Hill on Trustees, p. 231, note 2.

When land descends to the heir or is devised, and a naked power of sale is given to an executor, as in this case, the heir or devisee is entitled to the profits and possession until the sale. *Seymour v. Bull*, 3 Day, 389; Perry on Trusts, § 769.

A power must be strictly executed or the conveyance fails. Perry on Trusts, § § 511 a, 511 b, 783, 784, 785, 789.

A purchaser from one selling under a power, must at his peril see that the power is legally executed. Perry on Trusts, § § 789, 790.

He must at his peril ascertain whether the facts justify the execution of the power. Perry on Trusts, § § 224, 769.

In the case at bar, Brewer, the executor, in attempting to convey title to Cobb and Jacobs under this power, recites in his deed: "It being necessary, in my opinion, to carry into effect the provisions of said will, to make this conveyance, and for the purposes therein expressed." This is mere recital and not proof of the fact; but it is not enough. His power authorized him to convey in trust, or to hold, if he believed the best interest of some one of the children would not be promoted by his coming into immediate or actual possession of his share. It was only in this contingency that he could convey, but in his deed he recites no such fact or belief. The deed therefore, on its face, is not full enough to be a good execution of the power, and it cannot be aided because the facts do not warrant it.

Whether the recital in this deed is sufficient or not, it does not conclude. *Stevens v. Winship*, 1 Pick. 325; *Minot v. Prescott*, 14 Mass. 496; *Larned v. Bridge*, 17 Pick. 339; Perry on Trusts, § § 224, 769; Sugden on Powers, 267; Hill on Trustees, 478, note 2.

A widow had power under a will to mortgage for her support. It was held that she could not mortgage for one thousand five

hundred dollars unless the whole amount was needed for her support. *Paine v. Barnes*, 100 Mass. 471.

Power to sell on contingency, sale cannot be made unless contingency happens. And that is a question of fact for the jury. If contingency has not happened, deed reciting the power is invalid. *Stevens v. Winship*, 1 Pick. 325; *Minot v. Prescott*, 14 Mass. 496; *Larned v. Bridge*, 17 Pick. 339; *Rathbun v. Colton*, 15 Pick. 486; *Johnson v. Battie*, 125 Mass. 453.

In *Penniman v. Sanderson*, 13 Allen. 193, the sale was sustained, but the power authorized a sale if deemed expedient to raise money for any purposes of the will. The contingency on which sale may be made is a condition precedent, and must exist before a sale can be made. Sugden on Powers, 267; Hill on Trustees, 478, note 2.

If the power is to sell to invest in a particular way, the purchaser is bound to see to the application of the purchase money. Sugden on Powers, 268; *Doe v. Martin*, 4 Term R. 39.

The invalidity of the deed is not apparent on its face, hence equity has jurisdiction. *Briggs v. Johnson*, 71 Maine, 235; Daniel's Chancery, v. 3, p. 1961, note; Story's Equity, vol. 1, § 700-711; *Hubbell v. Currier*, 10 Allen, 333; *Knight v. Maybury*, 48 Maine, 158; *Crooker v. Crooker*, 46 Maine, 250; *Chafee v. Bank*, 71 Maine, 529.

Frank and Larrabee, for the defendants, cited: *Brown v. Johnson*, 53 Maine, 248; *Pierce v. Faunce*, 47 Maine, 507; *Morse v. Machias W. P. Co.* 42 Maine, 119; Story's Equity Pleadings, § 76, c. (n. 4) § 87 and n. 6, and §§ 73, 510, 245, 246 and 249 a.

Bill is demurrable because there was no written memorandum by either of these defendants to convey said real estate. *Walker v. Locke*, 5 Cushing, 90; *Ahrend v. Odiorne*, 118 Mass. 263; 1 Williams, Executors, 549; 2 Redfield, Wills, 122-3-4; Perry on Trusts, § 501; 2 Spence, 366 and 367; *Going v. Emery*, 16 Pick. 107; Perry on Trusts, § 224, 218 and 219; *Somes v. Brewer*, 2 Pick. 184; *Green v. Tanner*, 8 Met. 411; *Robbins v. Bates*, 4 Cush. 104; *Hoffman v. Noble*,

6 Met. 68; *Wyman v. Hooper*, 2 Gray, 141; *Spofford v. Weston*, 29 Maine, 140; *Roberts v. Bourne*, 23 Maine, 165; *Bates v. Norcross*, 14 Pick. 224; *Tilton v. Hunter*, 24 Maine, 29.

WALTON, J. This is a suit in equity. The contention is in relation to the title to real estate. One party claims title by a deed from the executor of Jonathan Smith. The other party claims title to thirteen-twentieths of the estate by deeds from four of Jonathan Smith's heirs. The defendants are Henry M. Brewer, the executor of Jonathan Smith, and George W. Cobb and Elias M. Jacobs, the purchasers from the executor. The plaintiff is the purchaser from the heirs. He contends that the heirs had authority to convey. But he contends further, that if the legal title was in the executor, and he alone had authority to convey, still the equitable and beneficial interest was in the heirs, and that he purchased from them with the knowledge and consent of the executor, and with a promise from him that the title should be made good. And he avers that at the time of the conveyance from the executor to Cobb and Jacobs, they knew of his purchase from the heirs and of the agreement of the executor to be bound by it. And he claims that under these circumstances the purchase of Cobb and Jacobs from the executor was fraudulent and collusive; and he asks that the deed to them may be cancelled and his title made good.

We think the relief prayed for can not be granted. The evidence shows clearly that Cobb and Jacobs were the first to bargain for the land, and that the plaintiff's efforts to obtain the title were made with a full knowledge of this fact. Their purchase was not an interference with his. His was an attempted interference with theirs.

There is no doubt that the legal title and the authority to convey were vested in the executor. It is well settled that an authority to sell, vested in an executor by the testator's will, vests in him the legal title also. *Richardson v. Woodbury*, 43 Maine, 206; *Deering v. Adams*, 37 Maine, 264.

Jonathan Smith's will authorized the executor to make such

conveyances and disposition of his estate, as should, *in the opinion of the executor*, be necessary to carry into effect the provisions of the will. Such a power vests in the executor an authority to sell limited only by his own judgment of what is necessary to carry into effect the provisions of the will; and, by necessary implication, as the cases cited will show, also vests in him the legal title. Having the legal title and authority to sell, the executor, by his deed to Cobb and Jacobs, conveyed to them a perfect title: and, under the circumstances disclosed by the evidence, there is no rule of law or equity which will justify the court in disturbing it. As already stated, Cobb and Jacobs were the first to bargain for the property. Their contract for the purchase of it was as complete as a contract for the purchase of real estate can be which is not reduced to writing and a deed for the conveyance of it not yet executed. The plaintiff's attempt to obtain a title through the heirs was an effort, knowingly and intentionally made, with a view, and with the intention if possible, to thereby discourage and prevent Cobb and Jacobs from completing their purchase from the executor. The court, sitting as a court of equity, can not lend its aid to render such an effort successful.

Bill dismissed with one bill of costs for the defendants.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

CHARLES MERRILL, administrator,

vs.

INHABITANTS OF NORTH YARMOUTH.

Cumberland. Opinion April 7, 1886.

Contributory negligence. Ways.

It is settled law in this state that, in an action against a town to recover damages for the death of a person alleged to have been caused by the negligence of the town in not keeping one of its ways in repair, the burden of proof is upon the plaintiff to show due care on the part of the deceased. A person undertook to drive with a horse and pung over a road, across which

78	200
91	235

78	200
105	165

was flowing at the time a stream of water thirty or forty rods wide, and in some places not less than three feet deep, with a current moving at the rate of five miles an hour, and carrying upon its surface cakes of ice, some of which were twenty-five or thirty feet in diameter; at some stage of his journey, and in some way, he and his horse got out of the road and were precipitated into the deeper channel of the river below and drowned. Held, that one who knowingly and unnecessarily exposes himself to such perils can not be regarded as in the exercise of due care.

ON EXCEPTIONS.

An action on the case for negligence brought under the provisions of R. S., c. 18, § 80, for damages for the loss of the life of plaintiff's intestate, Oliver B. Corliss late of New Gloucester, on the twenty-seventh day of March, 1884, by reason of an alleged defect in a county way within the limits of the defendant town.

The opinion states the material facts.

Woodman and Thompson, for the plaintiff, contended that the condition and appearance of the overflow, as it was approached by the deceased, was not such as to excite apprehension and that the places and condition in which the horse and pung, the contents of the pung and the body of the deceased were afterwards found, all indicated that when the danger appeared the deceased took the eggs, pung seat and robe out of the pung and placed them on a cake of ice, and attempted to turn around and go back. That all of these things indicated the exercise of care. That the deceased was not to be charged with contributory negligence because he did not look ahead from the edge of the overflow to a dangerous place of which he had no knowledge. It was enough that he attempted to return when the dangerous place was reached, and counsel contended that he would have undoubtedly succeeded if there had been a suitable railing as required in *Spaulding v. Winslow*, 74 Maine, 528.

This theory is a reasonable one, warranted by the undisputed facts, and it was for the jury to pass upon. *Weeks v. Parsonsfield*, 65 Maine, 286.

"The fact that a person takes some risk is not conclusive evidence under all circumstances, that he is not using due care."

Lawless v. R. R. Co. 136 Mass. 1; *Crumpton v. Solon*, 11 Maine, 337. See also *Mayor v. B. & M. R. R. Co.* 104 Mass. 142; *Hill v. Seekonk*, 119 Mass. 85; *Thompson v. Bridgewater*, 7 Pick. 189; *Horton v. Ipswich*, 12 Cush. 488; *Mahoney v. Metropolitan R. R.* 104 Mass. 73.

Symonds and Libbey, for the defendants.

WALTON, J. This is an action to recover damages for the death of a person, caused, as is claimed, by the negligence of the defendant town in not keeping one of its highways in repair. At the trial the presiding judge directed the jury to return a verdict for the defendants. The question is whether this direction was correct. We think it was. It is now the settled law of this state, that, in such an action the burden of proof is upon the plaintiff to show due care on the part of the deceased. *State v. Railroad*, 76 Maine, 357; *Lesan v. Railroad*, 77 Maine, 87.

It is the opinion of the court that in the present case this burden is not sustained; that, on the contrary, the evidence establishes a clear case of contributory negligence.

The deceased lost his life by drowning. No one witnessed the accident; but the evidence is such as to leave no doubt that he undertook to drive with a horse and pung over a road across which was flowing at the time a stream of water thirty or forty rods wide, and in some places not less than three feet deep, with a current moving at the rate of five miles an hour, and carrying upon its surface cakes of ice some of which were twenty-five or thirty feet in diameter; and that, at some stage of his journey, and in some way, he and his horse got out of the road and were precipitated into the deeper channel of the river below and drowned.

Surely, one who knowingly and unnecessarily exposes himself to such perils can not be regarded as in the exercise of due care. We say knowingly, for this accident happened in broad day light, about the middle of the forenoon, when the deceased could see not only the extent of the overflow, but the proximity of the river, and the want of a railing or other means of protection, to enable him to keep the road and prevent his being washed away

by the current. And there was nothing in the nature of a trap. The deceased was familiar with the road. He had passed over it twice the day before. Although seventy-eight years of age, he appears to have been in the full possession of his mental faculties, and blessed with good eyesight. All the dangers of the situation must therefore have been known to him. And he seems to have braved them unnecessarily. A mother who rushes in front of an approaching engine to save the life of her child has an excuse for her rash act. One who, in great peril, jumps from a carriage, may be excused for so doing. One who rushes into a torrent of water to rescue one who is drowning may be said to act under a moral necessity. But no such mitigating circumstance appears in this case. The deceased was going from his home, not toward it, so that the ordinary anxiety one feels when away from home to return to it, could not have influenced him. And so far as appears his only business was to market a few eggs, and no necessity for haste in the performance of that duty is shown. He was not therefore impelled to go forward by any overwhelming necessity. The act seems to have been voluntary and wholly unnecessary, and with a full knowledge of the dangers to be encountered. Surely, a verdict finding due care on his part could not be allowed to stand. The direction to the jury to return a verdict for the defendants was therefore correct. *Heath v. Jaquith*, 68 Maine, 433, and cases there cited.

This conclusion renders it unnecessary for the court to express an opinion as to whether the town was or was not guilty of negligence in not raising the road so as to render an overflow impossible; or whether [as the plaintiff's counsel contend] it was remiss in not providing a railing to prevent travellers, who should attempt to use the road when overflowed, "from being swept to their death." It is sufficient to say that the road was in the same condition in which it had been "from time whereof the memory of man runneth not to the contrary," and that no accident had ever before happened, and that this one would not have occurred if the deceased had used that degree of caution which his neighbors used; for those who approached the place that morning turned back, and did not attempt to go through,

and no one of the witnesses pretends that he would have attempted to drive through when the deceased did; or that he ever knew a person to drive through when the water was as high as it was then; and however careless it may have been for the town to leave the road in a condition in which it was liable to be overflowed, and without a railing to catch travelers who might be washed out of it; still, its condition was as well known to the deceased as to any other inhabitant of the town. He had passed over the road twice the day before. And if it was careless in the town to allow it to remain in that condition, it must have been equally careless in him, knowing its condition, voluntarily and unnecessarily, to attempt to use it; so that the two negligences combined to produce the accident; in which case it is well settled that a recovery can not be had. *Lesan v. Railroad*, 77 Maine, 87, and cases cited.

Exceptions overruled.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

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INHABITANTS OF CAMDEN vs. INHABITANTS OF BELGRADE.

Knox. Opinion April 7, 1886.

Evidence. Secondary evidence. Marriage, proof of. New trial. Practice.

Whether the evidence of the loss or destruction of a paper is sufficient to let in secondary evidence of its contents, is a question addressed to the discretionary power of the presiding judge.

To let in oral evidence of the contents of a lost paper, it is sufficient if the witness can state the substance of its contents.

A paper found in the possession of one of the parties to an alleged marriage, or produced by such party, purporting to be a marriage certificate, is admissible in proof of marriage, in civil cases other than actions for seduction, without proof of its genuineness, or that it was given by one acting in an official capacity.

In proof of a disputed marriage in civil suits, (other than actions for seduction) cohabitation, reputation, the declarations of the parties — written or oral — and their conduct, and all other circumstances usually attending the marriage relation and indicative of its existence, are admissible in evidence; and where there is shown to have been cohabitation for some years and children born to the parties, it is admissible to show what kind of a family the woman had previously belonged to and what kind of a home she had left.

A motion for a new trial on the ground of newly discovered evidence will not be granted if the evidence in support of it is not taken within the time ordered by the court.

ON exceptions and motion.

An action for pauper supplies furnished William O. Kaherl and his wife, Mary O. Kaherl, and their children. It was admitted that the settlement of William O. Kaherl was in Belgrade, and the settlement of his wife, before her marriage to him, was in Camden. The defence only related to the settlement of Mary O. Kaherl and the children; the defendants contending that Kaherl was previously married to Esther A. Craig, who was living and was his lawful wife at the time of Kaherl's marriage with Mary O. Kaherl, and that, upon that ground, the latter marriage was void.

A. P. Gould, for the plaintiffs.

When secondary evidence is resorted to for proof of an instrument which is lost or destroyed, its execution must be proved. This is a general rule. 1 Greenl. Ev. (13th ed.) § 558, note 4; *Kimball v. Morrell*, 4 Maine, 368, where our court say: "When a party, on an issue to the country, would avail himself of an instrument in writing, lost by time and accident, he should first prove that the instrument was duly executed; then, and not till then, he is permitted to give evidence of its contents."

This is applicable to all classes of instruments which, if produced in court, would be pertinent in the proof of a fact at issue. 1 Whart. Ev. §§ 140, 141, 142, and authorities cited in notes.

In *Dunlap v. Glidden*, 31 Maine, 510, the defendants "proposed to prove a conveyance, by parol evidence of the contents of a lost deed, the execution of which was not proved." Court held that the testimony was inadmissible, and that, if admitted, it would not prove a conveyance.

In *Edwards v. Noyes*, 65 N. Y. 125, it was held that "parol evidence to prove the contents of a lost deed must show that the deed was duly executed as required by law, and should show substantially all its contents."

In *Kelsey v. Hanmer*, 18 Conn. 311, it was held that "in the case of a lost instrument, it is incumbent upon the party to prove, not only its loss, but its existence as a genuine instrument, before he can give evidence of its contents."

No evidence was presented showing that any man by the name of John Young signed the pretended certificate, or whose hand writing the body of the certificate, or signature, was. And it had no date which is essential. *Gaines v. Relf*, 12 How. 472, 553; *Kinney v. Flynn*, 2 R. I. 319; *Railroad Bank v. Evans*, 32 Ia. 202; *Settle v. Allison*, 8 Geo. 201; 1 Whart. Ev. § 122;

As to the necessary form of a certificate in such case see 1 Bish. Mar. and Div. § 468.

No certificate can possess an official character which is not sufficiently signed. *People v. Eureka Lake Co.* 48 Cal. 143; *Wickliffe v. Hill*, 3 Littell, (Ky.) 330; *Connelly v. Bowle*, 6 Har. & John, 141; R. S., c. 59, § 15; Laws 1846, c. 190; 1 Starkie's Ev. 174, note (e).

In *Wedgwood's case*, 8 Maine, 75, the evidence was a certified copy from the town records of the certificate of the magistrate who solemnized the marriage, in which he certifies in his official character of justice of the peace. The court seems to approve that kind of evidence in divorce cases, but held it not sufficient in an indictment for adultery.

In *Jones v. Jones*, 18 Maine, 308, the certificate of Judge Gilman, in which he certifies, both as a justice of the peace and judge of the municipal court of the town of Hallowell, seems to have been held sufficient, in a divorce case, to prove the marriage.

In *State v. Hodgskins*, 19 Maine, 155, the court, in distinguishing between a marriage inferable from circumstances, and a marriage in fact, proof of which is necessary in criminal cases, holds, that proof of the performance of the ceremony of marriage by a person who appeared to have authority, was not sufficient. And it was held that there must be affirmative proof of the official character of the person who in fact solemnized the marriage.

In *Commonwealth v. Morris*, 1 Cush. 391, the court say:

"A certificate, purporting to be a marriage certificate, made by a clergyman of another state, was offered by the prosecution to prove the defendant's marriage, and was objected to, but admitted. We are of opinion that the paper, wholly unauthenticated, was not competent evidence, and ought not to have been admitted. And it received no additional weight by coming from the custody of the woman alleged to be his wife."

The judge, in his instructions to the jury, authorized them to give the certificate greater probative force than it was entitled to, even if it was receivable for any purpose.

In proof of a marriage in a suit between strangers to both parties, the declarations of either of the alleged parties to the marriage, can be received only as a part of the *res gestae*. They must accompany some act of deportment, or attend the intercourse of the parties, such as addressing each other as persons actually married. 1 Greenl. Ev. (13th ed.) § § 307, note 4, and 108; *Posterns v. Posterns*, 3 Watts & Serg. 327; 2 Greenl. Ev. (13th ed.) § § 461, 462, and notes and authorities cited; 1 Greenl. Ev. § 110, (13th ed.).

Evidence that the Craig family "were good farmers, and owned a large farm, well off," was inadmissible. How this evidence became competent, it is difficult for us to see. Even if the character of the family was admissible, that it was good because they owned a large farm, would be a *non sequitur*. The use made of it was mischievous. It was a link in a chain of fiction, by which it was attempted to be shown that this Esther, who had a child by Kaherl in December, 1867, and lived with him as her husband the next year, and married Ruth in 1870, while Kaherl was still living, belonged to a respectable family *ergo*, that she was a respectable woman.

On the motion for a new trial counsel cited: *Holley v. Young*, 68 Maine, 215; *Hastings v. McKinley*, 2 E. D. Smith, 45; *Shen. Bank v. Wab. & St. L. R. Co.* 61 Iowa, 700; *Jones v. Fennimore*, 1 Iowa, 134; *Jackson v. Warford*, 7 Wend. 62; *Keller v. Savage*, 20 Maine, 199, 203; *Ellis v. Ellis*, 11 Mass. 92; *Clayton v. Wardell*, 5 Barb. 214; S. C. 4 Comstock, (4 N. Y.) 230; *Myatt v. Myatt*, 44 Ill. 473; *Seuser v. Bower*, 1 Penrose

& Watts, 450; *Haupt v. Haupt*, 5 Ohio, 539; *Jones v. Jones*, 45 Md. 144, and 48 Md. 361; *Archer v. Haithcock*, 6 Jones Law, N. C. 421; *Taylor v. Taylor*, 2 Lee, 274, (6 Eng. Eccl. R 124); *Breakley v. Breakley*, 2 U. C. Q. B. 349; *Wheeler v. McWilliams*, 2 U. C. Q. B. 77; S. C. 3 U. C. Q. B. 165; *George v. Thomas*, 2 U. C. Q. B. 604; 1 Bishop on Mar. & Div. Sects. 444 & 446.

Baker, Baker and Cornish, for the defendants, cited: *Badger v. Badger*, 88 N. Y. 546 (42 Am. Rep. 263); 1 Bishop on Marriage and Divorce, § 438; Hillard on New Trials, Chap. 15, § 35; *Camden v. Belgrade*, 75 Maine, 126; 2 Whar. Ev. § 1246 and cases; *Knowles v. Scribner*, 57 Maine, 497; *Ellis v. Buzzell*, 60 Maine, 209; 2 Greenl. Ev. § 463; *Doe v. Grazebrook*, 4 Ad. and El. (N. S.) 406; *Com. v. Morris*, 1 Cush. 291; *Sumner v. Sebec*, 3 Maine, 223; 1 Whar. Ev. § 653 and note 4; 1 Greenl. Ev. § 74, note 484 and cases; 1 Whar. Ev. § 655; *Derby v. Salem*, 30 Vt. 722; *Kennedy v. Doyle*, 10 Allen, 164; *Central Bridge Corp. v. Butter*, 2 Gray, 132; *Spaulding v. Hood*, 8 Cush. 605; *Blanchard et al. v. Young*, 11 Cush. 345.

WALTON, J. This is a pauper suit, and is a second time before the law court. The question formerly presented was whether a subsequent marriage could be invalidated by circumstantial evidence of a prior marriage; and it was held that it could. *Camden v. Belgrade*, 75 Maine, 126.

The case has been again tried, and is now before the law court: (1.) On exceptions to the admission of evidence; (2.) On exceptions to the charge of the judge; (3.) On motion for a new trial on the ground that the verdict is against evidence; (4.) On motion for a new trial on the ground of newly discovered evidence.

1. Of the exceptions to the admission of evidence. Witnesses were allowed to testify that in 1854, after Kaherl and Esther A. Craig commenced to live together as husband and wife, she showed them what purported to be a marriage certificate; and, evidence of the loss or destruction of the paper having been first

introduced, oral evidence of its contents was received. It is claimed that this evidence was improperly admitted, because the evidence of the loss or destruction of the paper was not sufficient, and because the witnesses were unable to give the whole contents of the paper, and because the genuineness of the paper was not shown, and because it did not purport to be executed in an official capacity. Whether the evidence of the loss or destruction of a paper is sufficient to let in secondary evidence of its contents is a question addressed to the discretionary power of the presiding judge; and, in the absence of any apparent abuse of his authority, his decision of the question is not revisable by this court. No such abuse is apparent in this case. And to let in oral evidence of the contents of a lost paper, it is not necessary that the witnesses should be able to state the contents with entire verbal accuracy; it is sufficient if they can state the substance of its contents. *Tobin v. Shaw*, 45 Maine, 331. In the case cited, in speaking of a letter which she had destroyed, the witness said, "I can't recollect the whole, but can the substance," and she was then allowed to state what she could recollect of its contents, and the law court held that the evidence was properly admitted. And see *Com. v. Rowark*, 8 Cush. 210. We think the witnesses in this case were able to state the contents of the marriage certificate with sufficient fullness to render their testimony admissible. And the admissibility of such a certificate, or, in case of its loss, oral evidence of its contents does not depend upon the genuineness or official character of the document. It being a settled rule of law that marriage may be proved in civil cases, other than actions for seduction, by reputation, declarations, and conduct of the parties, a paper found in the possession of one of the parties to the alleged marriage, or produced by such party, purporting to be a marriage certificate, is admissible upon the ground that such a possession or such a production of it is equivalent to a declaration of such party that the facts stated in the certificate are true. As evidence of an implied declaration, or admission, or as an act of one of the parties, such a certificate is admissible without

separate and distinct evidence of its genuineness, or that it was given by one acting in an official capacity. Proof of its genuineness, and that it was given by one acting in an official capacity, may enhance its weight, but will not affect its admissibility. It is admissible without such proof. And if it were not admissible without some evidence of its authenticity, the fact that it is kept and produced by one of the parties as evidence of the marriage, would be sufficient evidence of its genuineness to render it admissible. 2 Gr. Ev. § 462-3; 1 Gr. Ev. § 104, *et seq.*

2. Complaint is made that the rule admitting the declarations of the parties to the supposed marriage was administered too liberally. It is claimed that such declarations are admissible only as *res gesta*, and when made in the presence of each other. We find no authority for such limitations of the rule. In proof of a disputed marriage in civil suits (other than actions for seduction,) cohabitation, reputation, the declarations of the parties, written or oral, and their conduct, and all other circumstances usually attending the marriage relation and indicative of its existence, is admissible evidence. Its weight of course is for the jury. All the evidence objected to was admissible under some one of these heads, with one exception. One witness was allowed to state that the Craig family was made up of Augustus, Esther, Albert, Horace, Mr. and Mrs. Craig; that they lived on a farm, were good farmers, owned a large farm, and were well off. It is claimed that this evidence was inadmissible, and that the use made of it was mischievous. We think it was admissible. There was evidence that Kaherl had been paying attention to Esther, that he caused his intention to marry her to be published and obtained a certificate of the publishment, that he went to her father's house with a carriage and took Esther and carried her away and was gone over night with her, and that when they returned they said they were married, and that in about a week from that time he moved her home, and that for ten years or more they lived together as husband and wife, and raised a family of children; and when it is charged that they were not in fact married, that she had consented to leave her home and live with a man as his wife without being married, it seems to us that

one of the first things which an inquiring mind would want to know would be what kind of a family she belonged to, and what kind of a home it was that she had left. Such evidence, if favorable, would tend to strengthen the presumption of her innocence, and, if unfavorable, to weaken it. We think the evidence was pertinent and legally admissible.

3. Exceptions are taken to the charge. It is claimed that if the evidence relating to the marriage certificate was legally admissible, the judge, in his instructions to the jury, authorized them to give it greater probative force than it was entitled to; that the jury must have understood from the charge that they were authorized to find that John Young, a clergyman of the Methodist church, issued the paper as an official certificate of the marriage, and that, upon that direct evidence, they might find a legal marriage. We can not find that in his charge the judge any where stated to the jury that they would be authorized to find a legal marriage upon the evidence of the certificate alone. He seems to have been very careful not to so instruct them. He instructed them that, if satisfied of the existence of the certificate, it was a piece of evidence for their consideration, the weight of which they must determine "in connection with all the evidence in the case." We do not mean to say that it would have been an erroneous instruction if the judge had told the jury that, if they were satisfied of the existence of the certificate, and that it was in the usual form and signed by one authorized to solemnize marriages, they would be authorized to find a legal marriage from that evidence alone. It is a sufficient answer to the objection to say that the charge, as reported, does not contain such an instruction, and upon this point is quite as favorable to the plaintiffs as they were entitled to have it.

4. The jury found specially that William O. Kaherl and Esther A. Craig were lawfully married in 1854, as claimed by the defendants. The plaintiffs move to have the verdict set aside on the ground that it is not supported by the evidence. The motion can not be sustained. We think the evidence fully justified the finding.

5. The plaintiffs move for a new trial on the ground of newly

discovered evidence. This motion can not be sustained for two reasons. One reason is that the evidence in support of it was not taken within the time ordered by the court. Another reason is that the evidence, if it had been seasonably taken, is not sufficient in the opinion of the court to justify granting another trial.

Motions and exceptions overruled.

Judgment on the verdict.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

BENJAMIN LANDERS vs. DEXTER SMITH.

Kennebec. Opinion April 5, 1886.

Action for perjury. R. S., c. 82, § 137. Construction of statutes. Statute of limitations.

The statute, R. S., c. 82, § 137, * requires that either the action for perjury or the proceedings for review, should be begun within three years from judgment in the action in which the perjury was committed. The party who waits more than three years before doing anything, can not then revive his right of action against a witness by instituting proceedings for a review.

On report from superior court of facts agreed.

An action on the case for damages for the alleged perjury of witnesses introduced by the defendant at the trial of a former action between the parties, in which the verdict was for the defendant and judgment was rendered thereon April 21, 1877. At the March term, 1883, the plaintiff filed a petition for review of that action, and at the following October term that petition was dismissed. This action was commenced March 13, 1884.

Winfield S. Choate, for the plaintiff.

The only question presented by this report is as to the statute of limitations. The review was asked for under R. S., c. 89,

* Sec. 137. When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may bring an action on the case within three years after such judgment or after final judgment in any proceedings for a review thereof, against such adverse party, or any perjured witness, or confederate in the perjury, to recover the damages sustained by him, by reason of such perjury; and the judgment in the former action is no bar thereto.

§ 1, par. VII, and was presented within the time therein specified, and this action was commenced within three years from (as the plaintiff claims) the "final judgment" in the proceedings for review.

Counsel supposes a case of petition for review brought long after the time given by statute had expired, and argues that because in such a state of facts you might be led into an absurdity that therefore the legislature could not have intended that construction. I agree with that. I do not wish to be understood as contending that simply bringing a petition for review fifty years after judgment in the first trial, will give the party any right to bring this action after final judgment in review. That is not this case. In this case the petition for review was brought within the time limited by the statute, and whether five days or five years before that time expired, is not in the least material.

J. W. Spaulding and F. J. Buker, for the defendant, cited : *Severance v. Judkins*, 73 Maine, 379 ; *Garing v. Fraser*, 76 Maine, 41 ; *Winslow v. Kimball*, 25 Maine, 493 ; *Holmes v. Paris*, 75 Maine, 561 ; *Allen v. Young*, 76 Maine, 80.

EMERY, J. Courts will always endeavor to ascertain the real meaning and purpose of the legislature in enacting a new statute. In such endeavor they are not confined to the words of the particular statute in question. The general policy of previous legislation and the general principles of law and equity are to be considered, for there is a presumption (controllable of course by sufficient words) that the legislature did not intend any marked departure from such policy and principles. The results of any particular construction are to be anticipated, and if such results will be anomalous, unjust, or even inconvenient, it is a legitimate and strong argument against the construction contended for. It will be presumed the legislature did not intend any such results. The language of a statute would need to be very strong and clear to cause a belief that such was the intent.

The real meaning of a statute is to be ascertained and declared, even though it seems to conflict with the words of the statute.

See language of Chief Justice PETERS in *Holmes v. Paris*, 75 Maine, 561.

The cause of action created by R. S., c. 82, § 137, is the obtaining a judgment against another by perjury of a witness. Before that statute was passed, the only remedy of the injured party was by review, under the second specification of § 1, c. 89, R. S. He was entitled to a review of the action if he could show to the court that the testimony was false and that he was surprised by it at the trial, or by showing that the witness had been convicted of perjury therefor. The limitation of this remedy however was three years. The general limitation for all remedies (there being of course a few exceptions) was six years or less. It was the policy of the law and legislation to fix short limitations for special remedies.

This statute gave a new and additional remedy. The injured party may now bring his action directly against the witness, or he may apply for a review on discovering the perjury. He must however do one or the other within three years from the judgment. He should bestir himself within that time. If he remain wholly idle, he will be wholly barred. Such we think was the intent of the legislature. *Ut finis.*

The plaintiff concedes that the application for review should be made within the time limited for such applications, but urges by the seventh specification of grounds for review he has six years in which to make application. But under that specification the court has full discretion. It may not grant a review, even though all the required allegations be proved. If the cause alleged be one that falls within any of the prior specifications, the review ought not to be granted, at least after the time allowed by such prior specification. This construction contended for by the plaintiff would make the statute anomalous in regard to limitations. It would cause hardship, as may be easily seen. It would enable an unsuccessful litigant to wholly ignore the three years limitation named in the statute. He could delay all action for nearly six years, and then apply perfunctorily for a review, perhaps for the sole purpose of reviving his right of action under the statute, and without any purpose or desire for

a review. He might even then delay action on his petition, and thus extend the time for bringing the statute action. When finally driven out of court on his petition, he could delay still three years longer, by which time all means of defence would have been lost. We cannot think the legislature so intended. We think it intended the action or petition should be within three years. If the petition is begun within three years, the time for the action may be extended, otherwise it ends with the three years.

Plaintiff nonsuit.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

INHABITANTS OF PERU vs. ELIZA A. POLAND.

Oxford. Opinion April 7, 1886.

Married woman. Re-imbusement for pauper supplies. R. S., c. 24, § 45.

Where a married woman who has been totally deserted by her husband, makes application for and receives pauper supplies, her coverture is no bar to an action against her for re-imbusement under R. S., c. 24, § 45.

ON REPORT.

An action under R. S., c. 24, § 45, for re-imbusement for pauper supplies furnished the defendant upon her application by Oxford and Auburn and re-imbursed by the plaintiff town where the defendant had a legal settlement. The opinion states the material facts.

A. E. Herrick, for the plaintiffs, cited: *Brewer v. East Machias*, 27 Maine, 495; *Cutler v. Maker*, 41 Maine, 594; *Deer Isle v. Eaton*, 12 Mass. 328; *Kennebunkport v. Smith*, 22 Maine, 449; *Alna v. Plummer*, 4 Maine, 262; *Green v. Buckfield*, 3 Maine, 136; *Dixmont v. Biddeford*, 3 Maine, 205; *Augusta v. Kingfield*, 36 Maine, 239; *Raymond v. Harrison*, 11 Maine, 190; *Berkeley v. Taunton*, 19 Pick. 480; *Lewiston v. Harrison*, 69 Maine, 504; *Hanover v. Turner*, 14 Mass. 227; *New Bedford v. Chace*, 5 Gray, 28.

John P. Swasey, for the defendant.

The statute upon which the plaintiffs claim to recover was

evidently copied from the statutes of Massachusetts, and have stood upon our statute books ever since our organization as a state. It was the law of Massachusetts from June 1, 1818, until the revision of the statute when it was repealed. See *Stow v. Sawyer*, 3 Allen, 515; *Groveland v. Medford*, 1 Allen, 23. Hence it will be seen that the remedy relied upon by these plaintiffs against this defendant existed long prior to the enactments of the statute creating any liability upon the part of a married woman, and while marriage was a complete defense to all suits upon her contracts, express or implied.

By reason of her marriage her settlement as a pauper was fixed in the town of Peru. If her settlement had been in any other town Peru could not have made her liable by voluntary payment to Oxford and Auburn without an express contract. The plaintiffs paid Oxford and Auburn solely on the ground that the defendant's husband had his settlement in Peru, and the moment they incurred any expense the husband of the defendant became liable under the statute invoked by the plaintiffs. Can it be that the legislature a quarter of a century before a married woman had a legal existence should enact a law, thought to be unfit to be continued in the statutes of Massachusetts, capable of such a construction that in case a contract of marriage should link her settlement to that of a vagabond of a husband, the plaintiffs, because she happens to be the wife of their pauper and reduced to want by the acts of their pauper, can maintain a suit for re-imbursement against either? The married woman act was intended for her advantage and protection and not to operate to her injury and destruction.

EMERY, J. From the evidence and admissions we gather the following facts.

The defendant was a married woman but had been deserted by her husband who had left the state. Her pauper settlement was in the plaintiff town solely by virtue of her husband's pauper settlement being in that town. In 1879 and 1880, after the husband's desertion, the plaintiff town incurred expense for the support of the defendant, she having called for, and received pauper supplies. The action is under R. S., 1871, c. 24, sec.

34, now R. S., 1883, c. 24, sec. 45. The only question is, whether her coverture is a bar.

We do not think it is. At the time, and under the circumstances, she could have made express or implied contracts for her support, which would be binding on her as if sole. Any person furnishing her with needful supplies at her request, could have maintained an action therefor against her, despite her coverture. We think the statute gives the town as much right. Its language is explicit "A town which has incurred expense for the support of a pauper may recover of him," etc. "The statute is remedial, not penal. It gives to the inhabitants of a town the right to be re-imbursed for an expenditure incurred by authority of law against the recipient of the benefit. It merely creates an implied promise on his or her part to make the reimbursement." WHITMAN, C. J., in *Kennebunkport v. Smith*, 22 Maine, 449. There is no exception in favor of married women.

*Judgment for plaintiffs for \$67.19 and
interest from date of the writ.*

PETERS, C. J., WALTON, VIRGIN and HASKELL, JJ.,
concurred.

CATHERINE CONLEY, administratrix, vs. CITY OF PORTLAND.

Cumberland. Opinion April 7, 1886.

Master and servant. Fellow servant.

A city is not liable for an injury to a laborer employed in constructing a sewer, when caused by the carelessness of one who had the oversight and direction of the work.

ON REPORT.

This was an action by the administratrix of James Conley who was seriously injured while employed in constructing a sewer on Adams street in Portland, August 31, 1883. While thus employed a large quantity of earth fell upon him producing injuries which caused his death in a few minutes. This action was for damages for that injury, alleged to have been caused by the carelessness of the man who was the overseer and manager of the work.

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91	30
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194	555

Harvey D. Hadlock, for the plaintiff.

It is a general principle of law, founded in reason, that when one suffers an injury by the neglect of any duty owing to him, which rests upon another, the person injured has his action.

This doctrine applies not only to individuals, but to corporations, and it obliges such corporations to respond to such action, though such action be not expressly given by statute. 2 Dillon, *Municipal Corp.* § 761.

The rule of law is a general one, that the superior or employer must answer civilly for the negligence or want of skill of his agents or servants in the course of his employment, by which another is injured.

Municipal corporations, under the conditions herein stated, fall within the operation of this rule of law. 2 Dillon, § 766.

It may be observed that when it is sought to render a municipal corporation liable for the act of servants, or agents, a cardinal inquiry is whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, then they are the agents or servants of the corporation. 2 Dill. Mun. Corp. § 772.

Corporations act through agents, and are liable when the agents inflict an injury while in the performance of some corporate duty. 2 Thompson on Neg. 888.

Somers was the superintendent appointed by the defendant for the construction of the drain, and his negligence towards the plaintiff's intestate was the negligence of the defendant corporation. Wharton on Negligence, § 232, p. 220.

The act of the corporation, described in the plaintiff's writ, was not an act done by it in its sovereign capacity, and thus in the construction of a sewer, if the act be so negligently performed that the plaintiff is injured by reason of such negligence, he may recover his damages. *Donohue v. New York*, 3 Daly, 65; *Jacksonville v. Lambert*, 62 Ill. 519; *Merrifield v. Worcester*, 110 Mass. 216; *Wendell v. Mayor, &c. of Troy*, 4 A. C. C., N. Y. App. Dec. 563.

And while a municipality is not liable for collateral injuries

from the exercise of its lawful authority, it is otherwise, as to special damages caused by negligence in the construction or repairs of its public works. *Allentown v. Kramer*, 73 Pa. St. 406; 1 Hill, N. Y. 550; 17 Grat. 375; 21 Cal. 113; 31 Ala. 469; 13 B. & M. 559; *Dayton v. Pease*, 4 Ohio, 100; *Murphy v. Lowell*, 124 Mass. 564; *Hill v. Boston*, 122 Mass. 344; *Emery v. Lowell*, 104 Mass. 13; *Child v. Boston*, 4 Allen, 41; *Toledo v. Cone*, 41 Ohio; 5 Am. & Eng. Corp. Cases, 624.

The principles of law regarding the doctrine of *respondeat superior*, in its application to municipal corporations, are well sustained. *Barnes v. District of Columbia*, 91 U. S. 540; *Rowell v. Williams*, 29 Iowa, 210; *Van Fleet v. Davenport*, 47 Iowa, 97; *Russell v. Mayor, etc. of New York*, 2 Denio, 461; *Tone v. Mayor, etc. of New York*, 70 New York, 157; *Ham v. Mayor, etc. of New York*, 70 New York, 459; *New York, etc. Company v. Brooklyn*, 71 N. Y. 580; *Campbell v. Montgomery*, 53 Ala. 527; *Chicago v. Janey*, 60 Ill. 431; *Chicago v. Dermody*, 61 Ill. 431; Wood on Master and Servant, § 459; *Aldrich v. Tripp*, 11 R. I. 141; *Moulton v. Scarborough*, 71 Maine, 267.

The defendant corporation was the master, and the superintendent employed by that master had power to employ and discharge the men who were at work in the construction of the sewer, and the master is liable for the injuries received by workmen through the negligence of a superintendent under whose absolute control he places them. If a master employs inexperienced workmen, and directs them to act under a superintendent, and to obey the orders of him whom he puts in his place, they are not engaged in a common work with the superintendent, and the master is liable for the superintendent's negligence. And this is eminently the case with corporations which can only act through agents, general and special. Wharton on Neg. § 235, p. 222, § 241, p. 229. Thompson on Neg. 1028, and cases cited. *Railroad Company v. Fort*, 17 Wall. 553.

The act of him, who had charge of the construction of the trench and sewer, must for all practical purposes be regarded as the act of the corporation itself. Thompson on Neg. 1031.

Corporations act by agents, and are bound by their acts. *Frazer v. Penn. R. R. Co.* 38 Penn. 104; *Adesco Oil Co. v. Gilson*, 63 Penn. 146, 150; *Cumberland R. R. v. Hogan*, 45 Md. 229; *Patterson v. Pittsburg R. R.* 78 Pa. 389; *Brickner v. N. Y. R. R. Co.* 49 N. Y. 672.

When the employer leaves everything in the hands of a middle man, reserving to himself no discretion, then the middle man's negligence is the employer's negligence, for which the latter is liable, and this rule holds, although such superintendent was engaged at the same work with the servant injured. *Whar. on Neg.* § 229. *Mullan v. Philada. R. R. Co.* 78 Pa. St. 25; *Gormley v. Vulcan Iron Works Co.* 61 Mo. 492; *Spelman v. Fisher Iron Co.* 56 Barb. 151; *Kansas Pacf. v. Little*, 19 Ka. 227; *Malone v. Hathaway*, 64 N. Y. 5.

In the case of the *Chicago R. R. v. Byfield*, 37 Mich. 213, the court, by COOLEY, C. J., says: "But we also think that when the superior servant, by means of the authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risk and injury, the master must respond."

"It is only when the risk properly pertains to the business, and is incident to it, that the master is excused from responsibility." See *Ashworth v. Stanwix*, 3 El. and El. 706; *Mayhew v. Sullivan Mining Co.* 76 Maine, 109; *Slater v. Jewett*, 5 Am. and Eng. R. R. Cas. 527; *Malone v. Hathaway*, 64 N. Y. 5; *Little Miami Railway Company v. Stevens*, 20 Ohio, 415; *Railway Company v. Keary*, 3 Ohio St. 201; *Louisville and Nashville Railroad Company v. Collins*, 2 Duvall, 114; *Chicago and Milwaukee Railroad v. Ross*, 112 U. S. 390.

Joseph W. Symonds, city solicitor, for the defendant, cited: *Farwell v. Boston & Worcester R. R. Co.* 4 Met. 49; *Hayes v. Western R. R. Co.* 3 Cush. 272; *Albro v. Agawam Canal Co.* 6 Cush. 75; *King v. Boston & Worcester R. R. Co.* 9 Cush. 112; *Gilman v. Eastern R. R.* 10 Allen, 236; *Hodgkins v. Eastern R. R.* 119 Mass. 419; *O'Connor v. Roberts*, 120 Mass. 227; *Holden v. Fitchburg, R. R.* 129 Mass. 268; *Floyd v. Sugden*, 134 Mass. 563; *Johnson v. Boston Tow Boat Co.* 135 Mass. 259; *Beaulieu v. Portland Co.* 48 Maine, 291; *Eaton v.*

E. & N. A. R. R. Co. 59 Maine, 520; *Lawler v. Androscoggin R. R. Co.* 62 Maine, 463; *Shanny v. Androscoggin Mills*, 66 Maine, 420; *Blake v. Maine Central R. R. Co.* 70 Maine, 60; *Holmes v. Halde*, 74 Maine, 29; *Mayhew v. Sullivan Mining Co.* 76 Maine, 109; *Doughty v. Penobscot Log Driving Co.* 76 Maine, 143; *Cassidy v. Maine Central R. R. Co.* 76 Maine, 488.

WALTON, J. Earth fell upon one of the laborers engaged in constructing a sewer in the city of Portland and injured him so that he died soon after; and the question is whether, assuming that the injury was caused by the carelessness of the one who had the oversight and direction of the work, the city is liable for it. We think it is not.

It is settled law in this state that an employer is not responsible to an employee for an injury received through the carelessness of a fellow laborer; and it is equally well settled that the foreman, superintendent, or overseer of a job of work, is not on that account to be regarded as other than a fellow laborer with those who are at work under him. Such an employment does not elevate him to the dignity of a vice-principal. And these questions have been so fully and so recently discussed by this court that a further discussion of them can not be profitable. See *Doughty v. Log Driving Co.* 76 Maine, 143, and *Cassidy v. Railroad*, 76 Maine, 488, and cases there cited.

Plaintiff nonsuit.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

ANDREW J. HINKLEY and others, in equity,

vs.

DEXTER BLETHEN and others.

Androscoggin. Opinion April 7, 1886.

Equity. Receiver. Joint-stock companies.

The plaintiffs, four in number, and the defendants, thirteen in number, are members of an unincorporated joint-stock company; the property of the company at the commencement of the suit consisted of a building, a small

amount of furniture and eighty-two dollars in money, in all of the value of about eleven hundred dollars; the stock was divided into ten-dollar shares, of which the plaintiffs owned twelve shares and the defendants the balance; the building was erected for the use of the Patrons of Husbandry, of which all the defendants are members, and the plaintiffs had been members. *Held*, that equity does not require that a receiver should be appointed to sell the property and divide the proceeds among the members of the company.

ON REPORT.

Bill in equity, heard on bill, answer and proof.

Savage and Oakes, for the plaintiffs.

It is not equity to deny the complainants a remedy. Let the building be sold; it can injure no one. If it is worth more to the defendants than to the complainants, they will offer more for it. If it is worth more to an outsider than to either, the complainants are entitled to the benefit of it. It is the fairest way to dispose of the property and have the legal rights of all protected.

We say that under the statutes this case is analogous to a case of partnership, where the court never hesitates to apply the remedy we seek here.

Frank W. Dana and Willard F. Estey, for the defendants.

WALTON, J. This is a suit in equity. The plaintiffs appear to be members of an unincorporated joint-stock company; and they pray that a receiver may be appointed, the property of the company sold, and the proceeds divided among the members.

We are not satisfied that the prayer of the plaintiffs ought to be granted. The only property of the company is a building and its fixtures and a small amount of furniture, and less than a hundred dollars in its treasury, worth, all together, not more than ten or twelve hundred dollars. The building was erected by members of the Patrons of Husbandry, and has always been used by them as a place for holding their meetings, and apparently it is still needed by them for that purpose. The stock was divided into ten-dollar shares, of which the plaintiffs (four in number) own only twelve, the balance of the stock being owned

by the defendants (thirteen in number) all of whom are members of the Patrons of Husbandry. The plaintiffs were also members of the same society at the time when they acquired their interest in the property, but have since ceased to be such. The plaintiffs' bill of complaint contains an allegation "that said property 'is being mismanaged, wasted, and lost.'" This allegation is not proved. The net income of the property is not large, and we do not suppose its owners ever expected it would be. The building seems to answer well the principal purpose for which it was erected, and we do not think it would be just or equitable to deprive so large a majority of its owners of their interest in it to gratify the wishes of so small a minority. The minority can sell their interest if they do not wish to retain it; and probably they could realize as much for it in that way as they would be likely to if the whole property should be put into the hands of a receiver and be by him sold. The expenses attending the latter mode of disposing of the property would be very likely to absorb any additional price obtained in consequence of selling the whole instead of a part.

The bill when presented contained a prayer for an injunction against a proposed removal of the building from the lot on which it then stood to another. But a temporary injunction does not appear to have been obtained, and the removal has been effected; and it is agreed that under the circumstances the removal was proper, and the claim for such an injunction is abandoned.

As the question has been very fully argued by counsel, it may not be improper to add that we do not doubt our jurisdiction in this class of cases. The ground of our decision is, not want of jurisdiction, but the absence of equity in the plaintiffs' case sufficient to require us to exercise it in the manner prayed for in their bill of complaint.

Bill dismissed, with one bill of costs for defendants.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

78 224
101 450

GEORGE W. JOHNSON and others vs. THADDEUS H. DAY.

Kennebec. Opinion April 7, 1886.

Evidence. Exceptions. Practice.

Evidence of a declaration of a son of one of the parties, made in the presence and hearing of his father, who remained silent, was admitted against objections, and the jury were instructed that it was for them to determine what significance they would attach to it. *Held*, no error.

In order to sustain an exception to a ruling excluding a conversation, the exceptions must disclose what the conversation was.

An error must affirmatively appear in order to sustain an exception; it can not be assumed.

ON exceptions and motion from superior court.

Trover. Verdict was for twenty-three dollars and ninety-one cents. The exceptions and motion for new trial were by the defendant. The facts are sufficiently stated in the opinion.

Bean and Beane, for the plaintiffs, cited : 2 Benj. Sales, c. 1 ; Best, Ev. 895.

A. M. Spear, for the defendant, contended that the statement of defendant's son was not admissible in evidence.

Such testimony is admissible in two conditions. (1) "When silence is of such a nature as to lead to the inference of assent," or "if a party is silent when he ought to speak." (2) That the party upon whom a reply rests heard the statement to which a reply should be made. 2 Wart. Ev. § 1136. Neither of the conditions were satisfied in this case.

Upon the question of the lien of the plaintiffs and the ownership of lost goods, counsel cited : Story, Bailments, 126, 129 ; 8 N. H. 325 ; 1 Cush. 536 ; 62 Maine, 275 ; 42 Maine, 50 ; 39 Maine, 285 ; 32 Maine, 211 ; 63 Maine, 116 ; 11 Cush. 231 ; 1 Chitty, (4th ed.) 191, note *u* ; 2 Kent's Com. 536 ; 74 Maine, 452.

WALTON, J. This is an action of trover for a quantity of old iron of the alleged value of twenty-three dollars and six cents. The iron was once a part of the toll bridge at Hallowell, which

was carried away by a freshet in the fall of 1869 or the winter of 1870. The iron had lain at the bottom of the Kennebec river for over fourteen years ; and so far as appears, no one had during all that time made any effort to recover it, or to ascertain even where it lay. But in August, 1884, the plaintiffs, one of whom appears to have been a professional diver, by the aid of a diving suit and other apparatus, found the iron and removed it to the shore. The defendant then claimed it as his property, saying he had bought it of the bridge company some fourteen years before ; and he afterwards took the iron and hauled it away and converted it to his own use. The plaintiffs claimed that the iron had for a long time been totally abandoned, and had become derelict, so that any one who should search for it and find it and take possession of it, would become its owner ; and that they had in this way become the owners of it themselves. The issue was tried by the jury, and they found in favor of the plaintiffs.

During the trial, the plaintiffs offered evidence that at one time when the defendant was claiming that he had bought the iron of the bridge company, one of his sons spoke up and said, "Father, you never bought any such stuff as that. You only bought what was afloat. You didn't buy anything on the bottom." That the defendant turned round, but said nothing. To the admission of this evidence the defendant excepted. We think the evidence was admissible. True, it does not appear that the defendant made any reply, but silence may sometimes be regarded as an admission. Whether it should be so regarded in this case was a question for the jury. We think that under the circumstances presented by this case, the judge acted correctly in admitting the evidence, and that the jury were properly instructed that it was for them to determine what significance they would attach to it. While the defendant was upon the stand as a witness in his own behalf, his counsel asked him to state a conversation he had with one Eugene Lewis. The question was objected to and the answer excluded. To this exclusion the defendant excepted. We are unable to say whether the answer

was rightly excluded or not. The exceptions do not show what the proposed conversation related to. Counsel stated that it was offered on the question of abandonment; but he did not state, so far as appears by the exceptions, what the conversation was which he proposed to prove, and we cannot know therefore what it would have had any probative force upon that question. Error must affirmatively appear; it cannot be assumed. The exceptions therefore must be overruled.

We have carefully examined the evidence, and we think it justified the jury in returning a verdict for the plaintiffs.

Motion and exceptions overruled, judgment on the verdict.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

LAURA F. PLUMMER and another vs. BENJAMIN F. HILTON.

Lincoln. Opinion April 7, 1886.

Will. Devise. Life-estate. R. S., c. 73, § 6.

A testator made a devise in these words: "The certain lot of land aforesaid set off to me from my son, Isaac Hilton, Junior, I devise, give and bequeath to him, the said Isaac, Junior, in trust for his heirs so long as he shall live and after his death, to his heirs, their heirs and assigns, to have and to hold forever." *Held*, that the effect of this devise under R. S., c. 73, § 6, was to vest a life-estate in Isaac Hilton, Junior, and a fee simple in his heirs.

ON report of facts agreed.

Writ of entry to recover possession of certain real estate in Jefferson.

A. P. Gould and J. E. Moore, for the plaintiffs.

Rufus K. Sewall, for the defendant.

WALTON, J. This is a real action. The plaintiffs derive their title as follows:—

Isaac Hilton, Senior, devised the demanded premises to his son, Isaac Hilton, Junior, "in trust for his heirs so long as he should live, and after his death, to his heirs, their heirs and

assigns, to have and to hold forever." The effect of this devise, under our statute (R. S., c. 73, § 6), was to vest an estate for life in Isaac Hilton, Junior, and a fee simple in his heirs. Isaac Hilton, Junior, conveyed to his son, Benjamin F. Hilton, the other children of Isaac joining in the conveyance to their brother. The effect of this conveyance was to vest the whole title in Benjamin F. Hilton. The title then passed from Benjamin F. Hilton to Nancy C. Ames by the levy of an execution upon the land. Nancy C. Ames died and the title passed by descent to the plaintiffs as her heirs at law.

It is thus seen that the plaintiffs have apparently a valid title to the demanded premises, and are entitled to a judgment in their favor. And the defendant's counsel admits that this is so, if the effect of the devise from Isaac Hilton, Senior, to Isaac Hilton, Junior, was to vest a life estate in the latter, and a fee simple in his heirs. But he claims that such was not its effect. He claims that the first taker and his heirs held the estate in trust for the great grand children of the devisor, and that, till it reached the latter, it could not be legally levied upon. We are unable to sustain this proposition. We think the effect of the devise was, under our statute already cited, to vest a life estate in the first taker and a fee simple in his heirs, and that the estate was legally levied upon, and that the title is now vested in the plaintiffs. As agreed in the report, the entry must be,

Defendant defaulted.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

THOMAS J. HOWE vs. WISCASSET BRICK AND POTTERY COMPANY,
AND SETH PATTERSON, assignee, claimant.

Lincoln. Opinion April 7, 1886.

Liens on bricks. Insolvency.

One who performs labor, or furnishes labor or wood for manufacturing and burning brick, under a special contract by which he has a lien on the bricks for his pay, has no lien therefor under R. S., c. 91, § 28.

Such a lien is not affected by the insolvency of the debtor.

ON EXCEPTIONS.

An action to enforce a lien on bricks under R. S., c. 91, § 28. The defendant being insolvent the assignee in insolvency appeared and claimed the bricks attached. The exceptions were to the ruling of the presiding justice that the plaintiff had no statute lien.

The opinion sufficiently states the facts.

George B. Sawyer, for the plaintiff.

The lien sought to be enforced by this suit is based on R. S., c. 91, § 28. "Whoever performs labor, or furnishes labor or wood for manufacturing or burning bricks, has a lien on such bricks for such labor and wood," etc., and the same and subsequent sections prescribe the time, manner and proceedings for the enforcement of such lien, all of which have been complied with.

The statute is not one which can be restricted or diminished in its operation by strict rules of construction. It is in the interest of common right and in accordance with the common law. Chitty on Contracts, (10th Am. ed.) 594; *Sawyer v. Fisher*, 32 Maine, 28.

The vocabulary does not afford a more comprehensive term than the word "whoever" by which the application of the statute is determined. As defined by Webster, it is synonymous with "whosoever," and means "any one without exception," "any person whatever."

Proceedings in insolvency do not defeat a lien nor deprive the claimant of the ordinary and appropriate means for its enforcement. "The assignee takes the property subject to all existing liens and incumbrances." *Hutchinson v. Murchie*, 74 Maine, 187.

The plaintiff's employment as general manager made him an agent of the corporation. Law Dictionary, title "Manager." An agent may maintain a lien as against his principal. *Newhall v. Dunlap*, 14 Maine, 180.

Under the contract the bricks were, and were expected to remain the property of the company until sold, whether by the plaintiff as general manager, or by the treasurer, is immaterial. This contract was supplemental to his general employment. It

embraced all the elements of the particular lien at common law, except that the property was to go out of his possession before he would receive his pay. *Oakes v. Moore*, 24 Maine, 214; *Newhall v. Dunlap*, *supra*. It was not a mortgage. *Sawyer v. Fisher*, *supra*. Whatever other rights it conferred upon the plaintiff, he might lawfully waive them, and rely upon the statute lien, for which it laid a complete foundation.

In reply counsel cited: *Potter, Corporations*, § 84; *Bank of U. S. v. Dandbridge*, 12 Wheat. 64; *Bank of Columbia v. Patterson*, 7 Cranch, 299; 2 Kent's Com. 289, 290; *Coffin v. Rich*, 45 Maine, 507; 1 Greenl. Ev. 189; *Kip v. Bank of N. Y.* 10 Johns. 63; *Cram v. Bangor House Prop.* 12 Maine, 354; *Winslow v. Kimball*, 25 Maine, 493; *Ingalls v. Cole*, 47 Maine, 530; *Pratt v. R. R. Co.* 42 Maine, 579; *Collins Granite Co. v. Devereux*, 72 Maine, 422; *Deering v. Cobb*, 74 Maine, 332; *Briggs v. Parkman*, 2 Met. 258; *Clarke v. Minot*, 4 Met. 346; *Fuller v. Nickerson*, 69 Maine, 228; *Spofford v. True*, 33 Maine, 297; *Plummer v. Walker*, 24 Maine, 14; *Holmes v. Robinson M'f'g Co.* 60 Maine, 201; *Dyer v. Brackett*, 61 Maine, 587.

Henry Ingalls, for the defendant and assignee, cited: *Cunningham v. Hall*, 69 Maine, 353; *Storer v. Haynes*, 67 Maine, 420; *Lambard v. Pike*, 33 Maine, 141; *Bicknell v. Trickey*, 34 Maine, 273; *Pearson v. Tinckner*, 36 Maine, 384; *Johnson v. Pike*, 35 Maine, 291; *Perkins v. Pike*, 42 Maine, 141; *Bank v. Redman*, 57 Maine, 405; *Baker v. Fessenden*, 71 Maine, 292; *Deering v. Lord*, 45 Maine, 293.

LIBBEY, J. After the evidence was out the presiding judge directed the jury to return a verdict for the plaintiff for the amount claimed, and that he had no statute lien on the bricks attached therefor. To this direction the plaintiff excepted. If there was evidence which, if true, would authorize the jury to find that the plaintiff had such a lien the direction was wrong.

The evidence relied on to support his lien comes wholly from the plaintiff. The defendant corporation was engaged in manufacturing brick, in Wiscasset. The plaintiff was its general

agent in carrying on that business. He testified, in substance, that, in the spring of 1884, the corporation was without means to prosecute its business, and he made a contract with its directors to go to Wiscasset, contribute his personal labor, advance his money to hire laborers and buy wood, manufacture the bricks, get them into market, sell and convert them into money, reimburse himself, and pay the balance, if any, into the treasury of the corporation; and that under this contract he burnt two kilns of bricks, when the corporation was put into insolvency.

By this special contract he had a lien upon the bricks which he manufactured. The terms of the contract were inconsistent with the statute lien. The plaintiff was to put them into the market, convert them into money, satisfy his own claims, and pay the balance, if any, to the corporation. Proceedings to enforce a lien under the statute would prevent the performance of his contract. He could not put them into market and sell, but they must be attached and remain till judgment might be rendered for the lien, and then the sale is a judicial sale, at the place of manufacture. This process might be much more prejudicial to the defendant than the enforcement of the lien under the contract. The two liens could not exist together, and it must be presumed that the parties intended to substitute the lien by special contract for the statute lien. *Barrows v. Baughman*, 9 Mich. 213.

The plaintiff's lien under his contract was in no way affected by the insolvency. The assignee took only what interest in the property the debtor had. *Hutchinson v. Murchie*, 74 Maine, 187; *Merry v. Lynch*, 68 Maine, 94.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

CHARLES W. HOWARD *vs.* MAINE INDUSTRIAL SCHOOL FOR GIRLS.

Kennebec. Opinion April 16, 1886.

Contracts. Bids. Building committee.

A mere bid in answer to an advertisement for proposals for building does not constitute a contract.

78	230
91	36

A conditional acceptance, such as requiring a bond, delays the completion of the contract until the condition is complied with.

Where one party, as a corporation, acts through a building committee, a majority of the committee must concur in making any contract, or in varying one already made.

ON report from the superior court.

The case is sufficiently stated in the opinion.

Bean and Beane, for the plaintiff.

It may be argued that the vote of the committee requiring a bond was not complied with. If so, we contend, the published proposals and specifications called for no bond. The vote of the committee was after the agreement was completed — after the award was made.

Defendant's pleading sets up the statute of frauds; but this contract was for the erection of a building and that statute does not apply. *Hight v. Ripley*, 19 Maine, 137; *Abbott v. Gilchrist*, 38 Maine, 260; *Crockett v. Scribner*, 64 Maine, 447; *Towers v. Osmond*, 2 Stra. 506; *Crookshank v. Burrell*, 18 Johns. 58; *Mixer v. Howarth*, 21 Pick. 205.

H. M. Heath, for the defendant, cited: 53 Maine, 20; 53 Maine, 511; 63 Maine, 167; *Marshall v. Jones*, 11 Maine, 54; 59 Maine, 483; 36 Maine, 516; 43 Maine, 180; 16 Maine, 215; *Stoughton v. Baker*, 4 Mass. 522; *Kupfer v. So. Parish*, 12 Mass. 185; *Boylston Market v. Boston*, 113 Mass. 528; *Topping v. Swords*, 1 E. D. Smith, 609.

EMERY, J. The plaintiff's declaration briefly stated is, that he made a valid contract with the defendant corporation to furnish the mason work and material on a new school building for twenty-four hundred dollars and that the defendant prevented his going on under the contract after he had incurred expense on account thereof.

From the report of the evidence, we gather the following facts.

The Board of Managers of the defendant corporation, at a meeting held June 19, 1884, voted to proceed to build a new school building, and appointed a committee of five to advertise for proposals, and to take the necessary measures for such

erection. This committee, all five acting, advertised for proposals for furnishing the labor and materials required, according to plans, specifications, etc. In answer to said advertisement, the following written proposal was sent in to the committee. The Howard named in the proposal was the plaintiff.

"Hallowell September 20, 1884.

To the Building Committee of Industrial School.

We propose to put up the superstructure of said building as per plans and specifications or instructions of your architect, E. E. Lewis, of Gardiner, Maine, for the sum of forty-five hundred and fifty dollars.

John Hall, Carpenter.

Howard & Church, Masons."

On the same day, September 20, the building committee had a meeting, with three members present. They opened the bids and found the above bid to be the lowest. The record of the meeting then proceeds as follows.

"And the contract was awarded to Hall, Howard and Church, for \$4525.

"Voted. That the committee require a bond from the contractors to the amount of contract, for fulfillment; also forfeiture for delay in completing the work."

The same evening, the plaintiff met Mr. Rowell, one of the building committee, and asked him "who got the job," and was answered, "Hall, Howard and Church."

It is evident, that up to this point, there was no such contract between plaintiff and defendant as is stated in the declaration. The committee's advertising for bids was not an offer. They merely asked for offers. They did not agree to accept any. The first offer in the case was a joint one by Hall, Howard and Church. Even this was not accepted unconditionally. The committee required a bond, which was never tendered by the proposers. There was as yet no mutual assent. *Jenness v. Mount Hope Iron Co.* 53 Maine, 20; *Maynard v. Tabor*, 53 Maine, 511; *Cumberland Bone Co. v. Atwood Lead Co.* 63 Maine, 167. It is also evident, that the negotiations thus far were not with the plaintiff alone, but with Hall, Howard and Church. It was the joint offer of the three, the committee

proposed to accept, if a bond was furnished. *Non constat* that they would ever have accepted the plaintiff's single offer for mason work and material alone.

So far then, the proof does not sustain the declaration. But the plaintiff urges, that subsequent oral negotiations took place, in which it was agreed, that he should alone furnish the mason work and materials for \$2400. His own testimony however shows that he never had any talk with three of the committee, and that a fourth member, Mr. Nash, refused to negotiate with him alone, but demanded a contract, which should include Church at least, and also insisted on a bond. The only member of the committee, who made any subsequent talk with the plaintiff was Mr. Rowell, and the evidence is conflicting as to what was said by him. We do not find however from the evidence, that any other member ever assented to any change in the committee vote of September twentieth. We do not find any previous authority for, nor any subsequent ratification of the parol arrangements claimed by plaintiff to have been made with Rowell. The concurrence of a majority of the committee was essential for making a contract binding on the defendant. *Adams v. Hill*, 16 Maine, 215; *Hanson v. Dexter*, 36 Maine, 516; *Asylum v. Johnson*, 43 Maine, 180; *Curtis v. Portland*, 59 Maine, 483. The evidence does not show any such concurrence.

Plaintiff nonsuit.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

FRANK C. P. EMERY and wife

vs.

SAMUEL BATCHELDER and another, executors.

York. Opinion April 28, 1886.

Wills. Deficiency of assets. Annuities. Legacies. Trustees.

When the possibility of a failure of sufficient assets to meet the legacies named by a testator in his will has not been anticipated and specifically provided for by him, the presumption of intended equality prevails between general legatees, as well as equality in respect to the share to be borne in all deficiencies of assets.

In the administration of testamentary assets where there is a deficiency of such assets after the payment of debts, expenses and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general.

Annuities stand upon the same footing as legacies.

Between annuitants and legatees there is no priority merely because one is an annuitant and the other a legatee where the estate is deficient, but both must abate proportionally.

In the investment of trust funds, trustees are to conduct themselves faithfully and in the exercise of a sound discretion, not with a view to speculation, but rather to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

On report of facts agreed.

The case and material facts are stated in the opinion.

Bourne and Son, for the plaintiffs.

This action is not only authorized by the statute (R. S., c. 65, § 31,) but is in accordance with the decisions in Massachusetts and in our own state. *Farwell v. Jacobs*, 4 Mass. 635.

If the will shows an intention on the part of the testator to give a legatee a preference, that legacy is exempt from abatement in case of deficiency. *Roper, Legacies*, 115.

In the construction of wills the intention of the testator governs. *Sawyer v. Baldwin*, 20 Pick. 384; *Treadwell v. Cordis*, 5 Gray, 355; *Hall v. Cushing*, 9 Pick. 407; *Cowdin v. Perry*, 11 Pick. 510.

Counsel contended that the intent of the testator in the case at bar clearly indicated that the plaintiffs' annuity was preferred. In four other instances the testator created a trust in the usual form, "I give and bequeath unto . . . \$. . . to keep the same safely invested and apply the income." But in this provision for his sister's only child he expressed his intention in language that cannot be misunderstood. She was to have an annual income of four hundred dollars, payable quarterly.

In *Raphael v. Boehm*, 11 Ves. 92, the executor having failed to accumulate the interest by investment, according to the directions of the will, was charged personally with interest. See also, *Dornford v. Dornford*, 12 Ves. 127; *Forbes v. Ross*, 2 Bro. Ch. 430; *Prescott v. Pitts*, 9 Mass. 376.

In *Miller v. Congdon*, 14 Gray, 116, the court say: "It has been settled by a series of decisions that where an executor by express terms of the will, or by necessary implication is made a trustee of any part of the estate of the testator, with the obligation to invest and pay out the income thereof, it is his province and duty to separate the same from the mass of the testator's property, and invest it safely in some safe and productive stock, or at interest on good security." See *Vanorden v. Vanorden*, 10 Johns. 31; *Irvin v. Ironmonger*, 2 Russel and Myles, 531; *Roper, Legacies*, 411; *Lovell v. Briggs*, 2 N. H. 219.

Strout and Holmes, for the defendants, cited: *University of Penn. App.* 97 Pa. St. 187; 2 Redfield, Wills, 550-554; *Towle v. Swasey*, 106 Mass. 100; *Miller v. Huddleston*, 3 Macn. and Gord. 513; *Thwaites v. Foreman*, 1 Collyer's Ch. 409; *Titus v. Titus*, 26 N. J. Eq. 111; 2 Wms. Ex'rs, 1165, 1169, 1171, 1172, 1173, 1174; *Hubbard v. Hubbard*, 6 Met. 50; *Pollard v. Pollard* 1 Allen, 490; *McLearn v. Robertson*, 126 Mass. 537; *Wood v. Vandenburg*, 6 Paige, 277; *Richardson v. Hall*, 124 Mass. 228; *Pierrepont v. Edwards*, 25 N. Y. 128; *Farnum v. Bascom*, 122 Mass. 282; *Everett v. Carr*, 59 Maine, 325; *Shepherd v. Guernsey*, 9 Paige, 357; *Swasey v. Am. Bible Soc.* 57 Maine, 523; *Walker v. Hill*, 17 Mass. 380; *Wright v. Callender*, 2 DeG. M. & G. 652; *Croly v. Weld*, 3 DeG. M. & G. 993; *Brown v. Brown*, 1 Keen, 275; *Birch v. Sherratt*, 2 Chanc. App. 644; *Coore v. Todd*, 7 DeG. M. & G. 520; *Bancroft v. Bancroft*, 104 Mass. 226.

FOSTER, J. Although the present action is for the recovery of a legacy given in the form of an annuity, the questions arising in the case depend upon the construction of the twenty-second clause in the will of Daniel Austin, late of Kittery, deceased. By that clause he provides as follows: "I direct my executors hereinafter named, to reserve from my estate, and to keep securely invested, such a sum of money as will be sufficient to produce a net annual income of four hundred dollars, and to pay the said income in equal quarterly payments of one hundred dollars each, to Mrs. Mary Emery, wife of F. C. P. Emery of

Neponset, to her sole and separate receipt during her natural life; the first payment to be made three months from the date of my decease; the said principal sum at the death of the said Mary, to revert to and form a portion of my residuary estate."

The other provisions in the will become important only so far as they may serve to throw light upon the questions raised in relation to the intention of the testator under the foregoing clause, and the nature and amount of the legacies given by the will.

From these provisions it appears that the whole amount of the legacies was forty-one thousand eight hundred dollars, exclusive of this annuity and residuary legacies. The defendants, as it appears, have settled two accounts, showing a balance at that time for distribution of forty-five thousand four hundred and twenty-six dollars and twelve cents. They also, in the execution of their trust, and supposing the estate to be sufficient to pay all the legacies and this annuity in full, paid to the annuitant six consecutive quarterly payments of one hundred dollars each, under the clause in question, beginning three months after the death of the testator, the last one being on the fourth day of June, 1879. It was then found that the estate as invested was insufficient to set aside enough to meet this annuity in full and pay all the legacies named in the will. Accordingly the defendants, estimating the proportion of all the general legacies which the estate would meet at eighty per cent, have, since the fourth day of June, 1879, paid the annuitant eighty dollars quarterly, subjecting the annuity and the legacies to the same proportional abatement.

The principal controversy, therefore, is whether this annuitant should suffer *pro rata* with the other general legatees in the will or is entitled to priority over them and to payment of the annuity in full.

The answer to this proposition will be found when we come to examine the language used by the testator in the clause under consideration, the nature of the legacy therein named, and ascertain the intention of the testator as collected from the whole will; for his intention must be gathered, not from any

particular clause alone, but from all the provisions of the will. And here we may say that the language used is such that there can be no question but that this legacy is general and not specific. It is for a certain amount to be paid from the general fund of the estate. It is not specific, because not of any particular thing or from any particular money of the testator's estate. Therefore the general rule is, that in the administration of testamentary assets, when there is a deficiency of such assets after the payment of debts, expenses and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. *Towle v. Swasey*, 106 Mass. 104; *McLean v. Robertson*, 126 Mass. 538; *Swasey v. American Bible Society*, 57 Maine, 524.

And it is the settled doctrine that annuities stand upon the same footing as legacies, and as between annuitants and legatees there is no priority, merely because one is an annuitant and the other a legatee, where the estate is deficient, but both must abate in the same proportion. 2 Wms. Exrs. *1367; *Croly v. Weld*, 3 DeG. M. & G. 996; *Wroughton v. Colquhoun*, 1 DeG. & Sm. 357.

Of course the rule in reference to proportional abatement applies only in case the possibility of a failure of sufficient assets to meet the legacies named in the will has not been anticipated and provided for specifically by the testator. Whenever it can be shown that such possibility of deficiency of assets has been specifically provided for, then his directions will govern, and the loss must be borne by those upon whom he has seen fit to place it. Therefore if by express words, or by a fair construction, the intent of the testator is clearly manifest that one general legatee should have priority over the others, that intention must be carried out. But the burden lies upon the party seeking priority to establish it, and show that such was the intention of the testator, for the reason that in the absence of proof of such priority the testator is presumed to have considered his estate sufficient to pay all legacies, and therefore not to have thought it necessary to provide for a deficiency by giving preference to any of those upon whom he has bestowed his bounty. *Miller*

v. *Huddlestone*, 3 Macn. and Gord. 513. Consequently no priority will be allowed where the expressions are ambiguous and do not mark with certainty the testator's intention. *Swasey v. American Bible Society*, 57 Maine, 528; *Titus v. Titus*, 26 N. J. Eq. 111; *Thwaites v. Foreman*, 1 Collyer, 409. The language used by the testator in the will is the basis of inquiry as to his intention; but such extrinsic circumstances as aid in the interpretation of that language and assist in arriving at the intention may properly be considered.

In the light of these principles, when applied to the language used by the testator in the case before us, we fail to find anything, either in the particular clause, or in any part of the will, or in the circumstances surrounding the case, which indicates any intention on the part of the testator that his annuity should have any preference over the other legacies. There is nothing to indicate that it was not his intention that all his legacies should be paid—certainly nothing which indicates that one should be paid at the expense of the others.

The fact so strenuously urged upon our attention by the learned counsel for the plaintiff, that the testator directed the first installment to be paid at the end of three months from his death, does not indicate sufficiently that intention which is necessary to give priority to this annuity. *Swasey v. American Bible Society*, *supra*; *Everett v. Carr*, 59 Maine, 330. Thus it has been held that it is not sufficient for such purpose that the testator gave a direction, as to a general legacy to his wife, that it should be paid *immediately* after his death, out of the *first* moneys that should be received by the executors. *Blower v. Morret*, 2 Ves. Sen. 420. And the same principle applies whether the annuity is to commence immediately on the death of the testator, or at some future period. 2 Wms. Exrs. *1367. Nor will the meritorious character of the legatee, nor the fact of near relationship, be sufficient, when from the will itself there is no proof of an intention to prefer, although these facts, as stated by the Lord Chancellor, in *Miller v. Huddlestone*, *supra*, may constitute "an auxiliary reason for allowing such priority where the words used will favor the notion of a priority to a sufficient

degree." And in this last case it was held that life annuities to a daughter and to other relatives were not entitled to priority over other legacies, the language of the will furnishing no proof of such intention.

There are cases, however, where a pecuniary legacy would undoubtedly be exempt from abatement, as where it is founded on a valuable consideration, such as the relinquishment of a right of dower by the widow of the testator. *Towle v. Swasey, supra.* In such case the party takes not as a mere volunteer or beneficiary, but as a purchaser; for it is presumed that the testator intended to satisfy first the legal claims on his estate.

But in the case at bar it nowhere appears, and it cannot be claimed, that the annuitant, whose relationship is only that of niece to the testator, has any legal claim upon his estate other than as one of the general beneficiaries under his will. Had it been his intention that she should be preferred to the other legatees of the same class, it would have been very easy for him to have expressed such intention in unmistakable language. We must judge of his intention by what he has written rather than by what he might have written. There are a large number of general pecuniary legacies contained in the will, and, from anything that appears, any one of them is equally meritorious with that of the plaintiff.

Neither does the fact that the executors are directed to reserve from the estate, and keep securely invested, such a sum as will produce this annuity of four hundred dollars annually to the plaintiff, weigh sufficiently upon the question of intention to give preference or priority over the other general legacies. The executors owe the same duty and fidelity, in the administration of their trust, to the other general legatees as to this plaintiff. Most annuities of this kind have their origin from some specific directions on the part of the testator. Such directions may properly relate to the existence rather than the priority of the annuity.

It may be admitted as a well settled general principle, as claimed by the plaintiffs' counsel, that an executor is bound by directions in the will to invest money on interest, to pay the

income as directed, and generally to conform to the directions given in the will. Yet, when there is found to be a deficiency of assets, and no specific provision is made for such a contingency, it will be seen that it becomes necessary to apply a somewhat different rule of law; for every clause and provision in a will should be carried into effect if it can be done consistently with the rules of law, and the intention of the testator. And the decisions to which our attention has been called, where executors have been held strictly by the directions given in the will, are those where the estate has been amply sufficient to meet the different legacies mentioned. They cannot, therefore, be applied as the inflexible rule of action in cases where there is a deficiency of assets.

The evident intention of the testator here was, that his estate was amply sufficient to pay all the legacies. And when we examine the will and find that the possibility of a failure of sufficient assets to meet these legacies has not been specifically anticipated or provided for by the testator, we must be guided in our decision by the well settled rules of law,—that the presumption of intended equality prevails between general legatees, as a class, as well as equality in respect to the share to be borne in all deficiencies of assets. Consequently the plaintiff must share the same proportional loss with the other objects of the same bounty.

The remaining questions submitted by the report, and which it becomes our duty to pass upon, may be briefly considered.

The act of the executors in the purchase of nine thousand two hundred dollars in United States four per cent bonds for the purpose of being set aside under the twenty-second clause of the will, has been made the subject of severe criticism by the counsel for the plaintiff in his very able argument. But taking into account not only their security but also their exemption from taxation, and the comparatively small amount of trouble and expense in taking care of them, we do not feel justified in saying that the executors have acted in any way injudiciously in the investment which they have seen fit to make. The objection is not that the investment is not a safe one, but that, with the

high rate of premium which these bonds command in the market as compared with the rate of interest which they pay, some other more profitable investment might have been made.

It appears from the account of the executors that these bonds were purchased at a premium of less than three per cent. True, they have appreciated in value; but investments carefully and judiciously made, are not, as a rule, to be disturbed. As was said by the court in *Harvard College v. Amory*, 9 Pick. 461: "All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested."

The very recent case of *New England Trust Co. v. Eaton*, 140 Mass. 532, reaffirms the doctrine of the foregoing case, holding that "the investment of trust property should be made with a view of permanency and not in a spirit of speculation."

Finally: It is the duty of the executors to ascertain the gross amount of all the general legacies to be paid under the will, after the payment of debts, expenses, and specific legacies; and if it be found that the estate as invested is insufficient to pay the general legacies, and to set aside enough to pay this annuity in full, then they should ascertain what proportion of the general legacies and of this annuity the estate to be divided will pay, subjecting the general legacies, and the annuity (since June 4, 1879) to the same abatement *pro rata*.

Inasmuch as from the statement or figures before us it is impossible to ascertain the exact standing of the estate at the commencement of this action, and as a computation becomes necessary for the purpose of entering the actual judgment, upon the pleadings, in accordance with this opinion, the case is remanded for the amount of the judgment to be entered at *nisi prius* for whatever sum may be found due the plaintiff at the time this action was commenced, together with interest thereon

to the time of judgment: If nothing is found due the plaintiff, then judgment should be entered for the defendant.

PETERS, C. J., WALTON, VIRGIN and LIBBEY, JJ., concurred.

HASKELL, J., did not sit.

AARON S. COBB vs. MOSES CORBITT.

Oxford. Opinion April 28, 1886.

Division fences. R. S., c. 22, § 6.

The remedy provided by R. S., c. 22, § 6, in relation to division fences, is penal as well as remedial, and will not be extended by implication to cases not clearly embraced within the provisions of the statute.

To entitle a recovery of "double the value and expenses" of building that portion of a division fence assigned by fence viewers to the party who neglects to build the same, it must appear that the party seeking such recovery has built the whole of the part thus assigned.

ON EXCEPTIONS.

An appeal from the decision of a trial justice in an action under the statute to recover double the expense of building a part of that portion of the line fence between the lands of the parties as had been set off to the defendant to build by the fence viewers of Hebron. At *nisi prius* the defendant contended that the action could not be maintained because the plaintiff had neither completed the whole of his portion of the fence, nor all of the defendant's portion. The presiding justice ruled as a matter of law that such objection was not well taken and that, by reason thereof, the action could not be defeated. To this ruling the defendant alleged exceptions.

Bisbee and Hersey, for the plaintiff.

J. P. Swasey, for the defendant.

FOSTER, J. The plaintiff and defendant are occupants and owners of adjacent lands. Having disagreed respecting their obligation to maintain a partition fence between them, on application of the plaintiff, the fence viewers of the town, after due proceedings, in relation to which no question is raised, assigned

to the parties their respective shares in such partition fence. By this assignment the plaintiff was to build a certain specified portion of the fence in the center, and the defendant was to build the residue at each end. The time having elapsed in which each was to build his part of the fence, the plaintiff having built a part only of the fence thus assigned to him, proceeded and built that portion of the fence assigned to the defendant at one end of the line, the remaining portion assigned to the defendant and a part of that assigned to the plaintiff never having been built.

This action is brought under §§ 5 and 6, c. 22, R. S., to recover double the value of so much of that part of the division fence as was assigned to the defendant and built by the plaintiff.

The defendant makes no objection to the regularity of the proceedings of the fence viewers in matter of form, but contends that the plaintiff is not entitled to recover in this action upon other grounds. His position is, that the plaintiff, having built only a portion of that part of the fence assigned to the defendant, is not entitled to recover double the amount expended in building only such portion, the remainder never having been completed.

And such is the opinion of the court. The remedy being one afforded by statute, the plaintiff, to entitle himself to a recovery, must show a compliance with its provisions. He is not entitled to enforce the statute penalty against the defendant, for his own benefit, until he has performed what the law requires at his hands. Such remedy is penal as well as remedial, and will not be extended by implication to cases not clearly embraced within the provisions of the statute which the plaintiff invokes in his own behalf. *Abbott v. Wood*, 22 Maine, 541; *Wood v. Adams*, 35 N. H. 36.

That part of the statute under consideration — § 6 — provides, that "if any party refuses or neglects to build and maintain the part thus assigned him, it may be done by the aggrieved party; who is entitled to double the value and expenses, to be ascertained, and recovered as provided in section four." It is "the part thus assigned" which the aggrieved party is authorized to build upon refusal or neglect of the other party — and not any fraction of such part.

And when we examine section four to which reference is made for the manner of ascertaining and recovering the amount to which the aggrieved party may be entitled under sections five and six, it will be seen that one of the prerequisites to a recovery there, is, that the party complaining has "completed" such fence. No other conclusion can be reasonably arrived at than that the plaintiff, before he can be entitled to recover in this case, must show that he has complied with the statute and built, of the fence in question, "the part thus assigned" to the defendant. The building of a moiety of such part is not the building of the part contemplated by the statute; and a multiplicity of suits is not to be favored where one is all that was intended to be given.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

LEWIS STOWE

vs.

WILLIAM H. PHINNEY AND UNION MUTUAL LIFE INSURANCE COMPANY, trustee.

Cumberland. Opinion May 17, 1886.

Life insurance. Trustee process.

By the terms of a life insurance policy, the insurance company promised to pay the assured, his executors, administrators or assigns, for the sole use and benefit of his four children therein named, and the survivor or survivors of them, the amount expressed in the policy, after deducting therefrom any indebtedness the company might have on account of the contract, within ninety days after notice and proof of death. *Held:*

1. That the insurance, although for the sole use and benefit of the children, was payable, not to them, but by the express terms of the contract, to his own legal representative, who upon payment of the insurance would become a trustee under an express trust of the money thus collected for the *cestuis que trust*.

2. That the administrator of the assured was the only proper party who could maintain an action at law upon the contract, the policy having never been assigned, and the assured having died intestate.

3. That the insurance company, before payment over to the administrator of the amount due upon said policy, is not liable in trustee process at the suit of a creditor of one of the children named in the policy.

ON report of facts agreed.

The only question presented by the report was the liability of the trustee, and the opinion states the facts bearing upon that question.

S. C. Strout, H. W. Gage and F. S. Strout, for the plaintiff.

It is frequently stated in the cases and text books as a general rule, that to charge a trustee the defendant must have a cause of action against him. Drake on Attachments, § 463; *Maine Fire & Marine Ins. Co. v. Weeks and Tr.* 7 Mass. 438; *White v. Jenkins and Tr.* 16 Mass. 62; *Brigden v. Gill and Tr.* 16 Mass. 522; *Rundlett v. Jordan and Tr.* 3 Maine, 47.

These four cases are cited repeatedly as leading cases to sustain such general rule, but in fact they are not authority for any such position. Each case was presented and decided rightly upon facts not involving this rule, and its discussion, not being called for and entirely outside the facts of the case, was not authority but only *dicta*. If such rule exists it admits of so many exceptions as to practically abrogate it. See Drake on Att. § 464; *Staples v. Staples, Tr.* 4 Maine, 532; *Burnell v. Weld*, 59 Maine, 425; *Clapp v. Hancock Bank and Tr.* 1 Allen, 394.

Many more instances might be cited, but these are sufficient to show that such a rule does not in fact exist, and that the right to maintain an action, though a usual, is not a decisive test, as stated in *Whitney v. Munroe*, 19 Maine, 42. But were it decisive, the case shows, we submit, a cause of action by the defendant, William H. Phinney. The promise was to pay Edmund Phinney, his executors, etc., for the sole use of these children. It being impossible to pay to Edmund Phinney, and the words executors, etc., adding nothing to the promise, it is in effect a promise of the company to pay (upon a certain contingency which has happened) four thousand dollars, for the sole use of the children named, and upon such a promise the children must sue if any remedy exists. Here the proceeds are not assets in the hands of an administrator, and are not the property or personal estate of the deceased, but are the property of the children, "not by descent, but by virtue of the contract." *Cragin v. Cragin*, 66 Maine, 517.

By R. S., c. 64, § 1, "No administration shall be granted on the estate of any deceased intestate person, unless it appears that he left personal estate to the amount of at least twenty dollars, or owed debts to that amount, or left real estate of that value." If a person died leaving such a policy and no real or personal estate or debts to the above amount, no administrator could be appointed, and if the beneficiary could not sue, no remedy would exist.

It is fully established by a long line of decisions that suits upon fire and marine insurance policies may be brought in the name of the assured or of the parties in interest, whether named in the policies or not. *Phillips on Ins.* vol. 2, § 1,958; *Pitney v. Ins. Co.* 65 N. Y. 6; *Farrow v. Ins. Co.* 18 Pick. 56; *Somes v. Ins. Co.* 12 Gray, 532; *Patterson v. Ins. Co.* 64 Maine, 503. And that it makes no difference that by the express terms of the policy it is made payable directly to the person who negotiated the policy. *Williams v. Ocean Ins. Co.* 2 Met. 303; *Sleeper v. Union Ins. Co.* 65 Maine, 395.

Such decisions are not alone due to the fact that insurance policies are liberally construed, but that "it is sound doctrine applicable to simple contracts generally, and the appropriate and well established doctrine of contracts of insurance, that if one make a promise to another, for the benefit of a third, the latter can maintain an action upon it in his own name." *Molley v. Ins. Co.* 29 Maine, 340.

The concise statement of the elementary principle that the party to be benefitted by a contract not under seal, (and the policy here was not under seal,) may sue thereon, although the promise be not made to him, in *Chitty on Pl.* vol. 1, pages 5 and 6, is well sustained by a long line of decisions, among which are *Sargent v. Morris*, 3 B. & A. 277; *Felton v. Dickinson*, 10 Mass. 287; *Arnold v. Lyman*, 17 Mass. 405; *Brewer v. Dyer*, 7 Cush. 340; *Martin v. Aetna Ins. Co.* 73 Maine, 28.

"On life policies the suit may be brought in the name of the beneficiary." *May on Ins.* § 446.

"The legal representatives of the insured have no claim upon the money and can not maintain any action therefor, if it is

expressed to be for the benefit of some one else." Bliss on Life Ins. §§ 317 and 318.

We are aware that it has been decided otherwise in *Bailey v. N. E. Ins. Co.* 114 Mass. 178, but that court does not always appear to have entertained the same opinion. In *Brewer v. Dyer*, 7 Cush. 340, the same principle was involved, and the court in a well considered opinion, fully discuss the rule, its reasons and exceptions, and say that he who would enjoy the benefit may maintain the action. As late as 1881, in *Norris v. Mass. Mut. Life Ins. Co. and al.* 131 Mass. 294, a bill in equity was brought by a creditor of the widow of W. L. Bowser, who had taken a policy in the defendant company, payable to him, his executors, administrators and assigns, for the benefit of the widow. Plaintiff held the policy, without assignment, as collateral to his debt of Mrs. Bowser, and brought his bill to compel the insurance company to apply the sum due on the policy to his debt. GRAY, C. J., says, "The contract of the company was with Mrs. Bowser only." And that the court could compel the application "of the money due from the company to Mrs. Bowser" to the payment of her debt.

Drummond and Drummond, for the trustee, contended that the trustee should be discharged on the ground that an action could not have been maintained against the company by the beneficiaries named in the policy, and to this point they cited: Chitty, Contracts, (11 Am. ed.) 74-76; Metcalf, Contracts, 205-211; *Bailey v. New England Insurance Co.* 114 Mass. 178; *Millard v. Baldwin*, 3 Gray, 484; *Field v. Crawford*, 6 Gray, 116; *Dow v. Clark*, 7 Gray, 198; *Frost v. Gage*, 1 Allen, 262; *Exchange Bank v. Rice*, 107 Mass. 37; *Butterfield v. Hartshorn*, 7 N. H. 345; *Warren v. Bachelder*, 15 N. H. 129; *Chamberlain v. Ins. Co.* 55 N. H. 249; *Bowers v. Parker*, 58 N. H. 565; *Porter v. Raymond*, 53 N. H. 519; *Treat v. Stanton*, 14 Conn. 445; *Saiely v. Cleveland*, 10 Wend. 156; *Greenfield v. Ins. Co.* 47 N. Y. 430; *Burroughs v. Assurance Co.* 97 Mass. 359; *Campbell v. Ins. Co.* 98 Mass. 381; *Unity Ass'n v. Dugan*, 118 Mass.

219; *Mass. Mut. Life Ins. Co. v. Robinson*, (Ill.) 11 Ins. Law J. 162; *U. S. Life Ins. Co. v. Ludwig*, (Ill.) 11 Ins. Law J. 700; *Tewksbury v. Hayes*, 41 Maine, 123; Dicey, Actions, 94-116.

FOSTER, J. The Union Mutual Life Insurance Company issued a policy of insurance to Edmund Phinney for the sum of four thousand dollars. By the terms of that policy the company expressly promised "to pay to Edmund Phinney . . . his executors, administrators or assigns, for the sole use and benefit of" his four children therein named and the survivor or survivors of them, the amount above named after deducting therefrom any indebtedness the company might have on account of this contract, within ninety days after notice and proofs of death.

On the thirty-first day of October, 1884, Edmund Phinney died, leaving the four children surviving him, of whom the defendant is one. Thereafter, within the time named for the payment of said insurance, this action was commenced. The plaintiff alleges that the defendant is owing him, and has summoned the insurance company as trustee. The only question presented is whether this company can be legally held in this suit. An administratrix has been appointed upon the estate of the deceased. The defendant, since the commencement of this action, has assigned all his interest in the policy and his claim upon the administratrix of the estate to the fund to a third party, who claims that the fund can not be legally attached in this process, and that it is payable from the company to the administratrix, and not to this defendant.

If the administratrix is the only party who could maintain this action at law upon this contract, it necessarily follows that a payment by the company to any other party would not be justifiable, and consequently this suit could not be maintained as against the alleged trustee. It should be understood that we are not speaking of the rights of these parties otherwise than in an action at law. Whatever might be our decision were this in its nature an equitable trustee process, as now provided by

R. S., c. 77, § 6, par. 10, where the remedy is more elastic and equitable than in suits at law, it is unnecessary now to determine.

Upon a careful consideration of the case, and from an examination of the authorities, we feel confident that the company is not chargeable in this process. It is the established general rule that a party is not chargeable in trustee process, with respect to credits, unless he is liable in an action to the principal defendant. This test, it is true, is not always decisive, for there are exceptions to the rule. The facts in this case, however, do not bring it within any of those exceptions.

The question then is, who is the party that can maintain an action upon this contract?

Our attention has been called to the various decisions not only in this, but in other states, bearing upon the question whether, when a promise is made to one party for the benefit of a third, the latter can maintain an action upon such promise. We do not, however, consider it necessary, in arriving at a proper decision in this case, to enter upon that question, nor to extend the doctrine laid down in *Mellen v. Whipple*, 1 Gray, 317, to a case like this where the express terms of the contract and the intention of the parties as evidenced by those terms, must be the rule by which we are to be governed in our decision.

The contract in this case was made by the company with Edmund Phinney, the deceased. By that contract the amount was made payable to him, his executors, administrators or assigns, for the sole use and benefit of his four children. At his decease the administratrix of his estate was the only party who could legally enforce that contract. The insurance, although for the sole use and benefit of the children, was payable, not to them, but by the terms of that contract to his own legal representative. The company, as well as the deceased, was party to that contract. It is unlike those cases where, by the terms of the contract, it was expressly promised that the amount was to be paid, either absolutely or upon the happening of some expressed contingency, to the beneficiaries themselves, instead of the legal representative of the assured.

Thus in *Martin v. Aetna Ins. Co.* 73 Maine, 25, the policy was in the name of the wife on the life of her husband, and the amount was made payable to her, her executors, administrators or assigns, if she survived her husband, otherwise to their children. The wife did not survive her husband, and the court held that by her death, the promise of payment to her, being contingent upon her surviving her husband, ceased, and was by the express provisions of the policy transferred to the children, who became the sole beneficiaries, and the only parties who could avail themselves of the promise.

Another illustration from our own court is the case of *Cragin v. Cragin*, 66 Maine, 517, where the deceased procured a policy of insurance upon his life "for the benefit of his wife and children" and the same was made payable to them — the beneficiaries — their executors, administrators or assigns; and it was held that the insurance could not have been collected in the name of the administrator of the deceased, but that it was the property of the widow and children by virtue of the express terms of the contract. So in *Knickerbocker Ins. Co. v. Weitz*, 99 Mass. 159, the contract was between the company and the wife of the assured, and the amount was made payable to her, her executors, administrators or assigns, and in case of her death before that of the assured, it was payable to her children "for their sole use, or to their guardian, if under age." On a bill of interpleader by the company the court say: "She having died before the termination of the policy, and her husband having also died within the term, the policy, by its express provisions was not payable to her representatives or assigns, but to the child or his guardian," and that the latter was entitled to recover the amount.

On the other hand, we find that where the contract is that it is to be paid to the representatives of the assured, rather than to the beneficiaries, such representatives are the only proper parties to maintain an action for its recovery. When collected, the fund is held by them as trustees under an express trust for such beneficiaries as may be entitled to it. This doctrine is in harmony with the entire line of decisions upon this question, and is founded upon reason as well as authority.

The question arose in *Burroughs v. State Assurance Co.* 97 Mass. 359, where the policy was made payable to the assured, his executors, administrators and assigns, for the use of his wife and children; during his life-time the assured, with the assent of the company, assigned the policy, and it was held that the assignee might maintain an action at law to recover the amount due, although the policy was expressed to be for the use of the wife and children, the plaintiff's right to recover at law resting upon the express contract between him and the insurers arising out of the terms of the policies and of the assignments to which they had assented.

The next case was that of *Campbell v. New England Ins. Co.* 98 Mass. 400, in which the policy was made payable to the assured, his executors, administrators and assigns, for the benefit of a wife of the brother of the assured, who brought an action to recover the insurance in her name as beneficiary. Objection to the maintenance of the action not having been seasonably taken, judgment was recovered in her name. GRAY, J., says: "In the present case, the plaintiff, though not the assured, was the person for whose benefit the policy was made, and was therefore the owner of the entire equitable interest, and might have maintained an action upon it in the name and without the consent of the administrator, or, if the latter had collected the amount of the policy, might have sued him for the proceeds. The plaintiff had the equitable interest in the policy, although not the title to support an action at law in her own name against the insurers."

In *Gould v. Emerson*, 99 Mass. 157, the policy was made payable to the assured, his executors, administrators or assigns, for the benefit of his widow, if any, and his surviving child or children. The court there say: "The contract of the insurance company having been made with the assured, his executors, administrators and assigns, the defendant, as his administrator, might by law collect the amount of the policy."

As if the question had not been sufficiently settled, it was squarely met in *Bailey v. New England Ins. Co.* 114 Mass. 177. In this case the assured procured a policy upon his life

payable to him, his executors, administrators and assigns, for the benefit of his widow. Suit was brought in the name of the beneficiary against the company, and judgment was rendered in favor of the defendants. The court in referring to the previous decisions of *Burroughs v. State Assurance Co.* and *Gould v. Emerson*, make use of the following language: "The principle upon which these decisions rest is, that in policies of this kind the executor, administrator or assignee, becomes a trustee under an express trust, and the legal title being in him, he can maintain an action in his own name against the company. It therefore necessarily follows that the *cestuis que trust* can not maintain such action, but must have their rights determined between themselves and the trustee in other forms of proceeding. This brings this class of trusts within the general rules governing all trusts, and renders the practice simple and uniform. To allow *cestuis que trust* to maintain actions in their own names, might subject insurers to several suits on the same policy, or call upon them to determine who has the beneficial interest, or force them to resort to a bill of interpleader to ascertain the equitable rights of the parties." This case is cited in support of the decision in *Unity Association v. Dugan*, 118 Mass. 221, where the policy in that case was taken out by the assured for the sole use of his wife, and the court held that "not being a party to the contract, nor named therein as payee, she could not maintain an action at law thereon," and that the sole right to sue at law upon the policy after the death of the assured, would be in the administratrix of his estate, and that the association might safely have paid the amount of the policy to her.

Stokell v. Kimball, 59 N. H. 14, is in accord with the principles laid down in the foregoing decisions, holding that where the policy is by its terms payable to the assured, his executors, administrators and assigns, the executor or administrator is a trustee or depositary to recover the money for the purpose of paying it to the beneficiaries. Our own court in *Cables v. Prescott*, 67 Maine, 583, recognize the same doctrine where it is held that the contract vests in the party to whom it is made payable for the benefit of the *cestui que trust*.

Nor does the case of *Norris v. Massachusetts Ins. Co.* 131 Mass. 294, to which our attention has been called by the learned counsel for the plaintiff, militate against the conclusions arrived at in this case, or the other decisions to which we have referred. It will be found that the case was a bill in equity, in the nature of an equitable trustee process, and not an action at law. The remedy there is much broader and oftentimes more efficacious, for while in such a proceeding, as in the case last named, even the entire equitable interest of the beneficiary may be reached and applied to the payment of his debt, (*Donnell v. Railroad Co.* 73 Maine, 570; *Phoenix Ins. Co. v. Abbott*, 127 Mass. 560,) yet a merely equitable right is not attachable by trustee process in an action at law. *Massachusetts National Bank v. Bullock*, 120 Mass. 88; Drake on Attachment, § 457.

We are of opinion that the questions involved in this case have been so far settled by judicial decisions as to render any further expression of our views unnecessary. Recognizing as a fundamental doctrine of trustee process, that the plaintiff does not, as a general rule, acquire any greater rights against the trustee than the defendant himself possesses, the exceptions to which rule do not apply to the case before us, our decision is that the entry should be,

Trustee discharged with costs.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

ABEL NASON vs. MAURICE WEST and another.

York. Opinion May 17, 1886.

Master and servant. Negligence. Presumption. Evidence.

The plaintiff was employed by the defendants to remove the sand, or "form" from a large oven which had been recently built by workmen employed by the defendants' lessor. After having taken it nearly all out by means of shovels and other tools furnished him by another servant in the employment of the defendants, the plaintiff crawled into the oven for the purpose of cleaning out the corners, and while in there the oven fell in upon him, burying him in brick, sand and mortar, and causing the injuries for which this suit is brought. There was no evidence that the defendants had any knowledge of the dangerous condition of the oven at the time the plaintiff

78	253
86	407
86	418
78	253
91	226
78	253
93	281
78	253
95	164
78	253
96	391
78	253
199	206
78	253
103	312
78	253
105	239

met with the accident, or that they were negligent in not knowing it. *Held*, that the verdict in favor of the plaintiff could not be sustained.

In order to entitle the plaintiff to recover, it must be shown that the defendants knew, or ought to have known, of the dangerous condition of the oven, and that the plaintiff did not know, or could not reasonably be held to have known of the defect which led to the injury.

The mere fact that the plaintiff may have sustained an injury while in the employment of the defendants, or upon their premises, raises no presumption of wrong on their part, and is not sufficient upon which to found a verdict.

Negligence being the basis of the plaintiff's action, it must be proved by evidence having legal weight, and upon which the verdict of a jury would be allowed to stand.

A mere scintilla of evidence is not sufficient.

ON motion to set aside the verdict.

An action to recover damages for personal injuries received by the plaintiff while in the employ of the defendants. The facts are stated in the opinion. The verdict was for the plaintiff in the sum of two hundred and forty-five dollars and the defendants moved to set it aside as against evidence.

Hamilton and Haley, for the plaintiff.

An employer is under an implied contract with his servant to furnish suitable means and instruments for carrying on the business and a suitable place that the servant may not be exposed to unnecessary risk. 8 Allen, 446; 110 Mass. 260; 102 Mass. 583; 66 Maine, 423; 48 Maine, 113; 10 Gray, 281.

The servant assumes the risk incident to the work, including the carelessness of his fellow-servants, and the master a safe place in which to perform the work and improved and safe machinery. The servant takes the risk of the use of the machinery and not of its construction. The master is held to know of any defect in the construction. 25 N. Y. 572; 1 Hilliard Am. Law, 83; 8 N. Y. 175; 66 Maine, 423.

When the accident is such, in the ordinary use of the thing and in the usual course of events, does not happen if those who had the management had used proper care, it is *prima facie* evidence of negligence. Bigelow Lead. Cas. on Torts, 597; Greenl. Ev. § 230; *Stevens v. E. and N. A. R. R.* 66 Maine, 74.

Inattention or want of care, if occasioned by the nature of the

employment, is no hinderance to a recovery when the injury is legally imputable to a defect. *Snow v. Housatonic R. R. Co.* 8 Allen, 441; *Spofford v. Harlow*, 3 Allen, 176; *Johnson v. Hudson R. R. Co.* 20 N. Y. 65; *McIntosh v. N. Y. Cent. R. R. Co.* 37 N. Y. 287; *Quirk v. Holt*, 99 Mass. 164; *Butterfield v. Weston R. R. Co.* 10 Allen, 532; see also Sherman and Redfield, Negligence, § 504.

H. Fairfield, for the defendant.

It must be proved that the injury was caused by the fault of the defendants. *Dickey v. Maine Tel. Co.* 43 Maine, 492; Sherman and Redf. Neg. § 12.

The defendants are not liable because they were tenants. *Taylor, Land. & Ten.* § § 175, 119, 120; *Wood, Nuisances*, § § 141, 142; *Coe v. Harahan*, 8 Gray, 198; *Larue v. Hotel Co.* 116 Mass. 68.

If an accident, defendants are not liable. *Osborne v. Knox and Lincoln R. R. Co.* 68 Maine, 50. See also Sherm. & Redf. Neg. § 6.

FOSTER, J. The defendants are lessees of a baker's shop at Old Orchard. In the rear of the building and near to it was the oven, first built by the lessor in the summer of 1883, in accordance with the stipulations in the lease from him to these defendants. This oven having been in use during that season, and owing to the high degree of heat necessary to its successful operation, some of the brick around the fire-box had melted, rendering it necessary to rebuild it. Accordingly the next summer the lessor, having his attention called to it, caused the oven to be rebuilt, employing a mason of many years experience, the same man who had constructed it the year previous. In the formation of the arch or roof of the oven, the bricks were laid over a "form," composed of damp compacted sand. A few days after the oven was completed, the defendants being ready to commence that season's business, engaged the plaintiff to go to Old Orchard with one of their workmen by the name of Roaks, to remove the sand from the oven. After having taken it nearly all out by means of shovels and other tools furnished him by

Roaks, he crawled into the oven for the purpose of cleaning out the corners. While in there the oven fell in upon him, burying him in brick, sand and mortar, and from which situation he was rescued a few minutes later, having received some slight injuries, and for which this action is brought.

The principles relating to the liability of the master for injuries received by the servant in the course of his employment are well defined, and have been frequently stated in judicial decisions. It only becomes necessary to make a proper application of them here, and by those well settled principles determine whether the verdict of the jury should be sustained.

The action set forth in the plaintiff's writ is founded on a charge of negligence. It is the gist of the action, and being alleged it must be proved. The mere fact that the plaintiff may have sustained an injury while in the employment of the defendants, or upon their premises, raises no presumption of wrong on their part, and is not sufficient upon which to found a verdict. Negligence on the part of the defendants being the basis upon which the plaintiff founds his action, it is to be proved. Presumption of negligence from the fact alone that an accident has happened will not do; for if there is any presumption in such a case it is that the defendants have complied with those obligations which rest upon them equally with other men.

There are cases, to be sure, like those against depositaries, inn-keepers and common carriers, where property is lost which is confided to them, or where the nature of the accident or attending circumstances is such that negligence may be presumed from the act. But in the ordinary class of cases, of which the one before us forms no exception, the burden lies upon the plaintiff to prove the negligence which he alleges.

And while it is true that this may be done by proof of facts from which it may reasonably be inferred that the defendants' negligence caused the injury complained of, it is equally true that a mere scintilla of evidence is not sufficient. It must be evidence having legal weight, and upon which the verdict of a jury would be allowed to stand. *Connor v. Giles*, 76 Maine, 134; *Beaulieu v. Portland Co.* 48 Maine, 296; *Cornman v.*

Railway Co. 4 Hurl. & Nor. 784; *Toomey v. Railway Co.* 3 C. B. (N. S.) 149; *Cotton v. Wood*, 8 C. B. (N. S.) 568.

And in order for the plaintiff to be entitled to recover in this action it must be shown that the defendants owed some duty to him and that there was a neglect of that duty. If the plaintiff received an injury as the result of an accident solely, and the defendants were without fault, the action is not maintainable. Ever since the decision in the case of *Priestely v. Fowler*, 3 Mees. & Wels. 1, in the English court of Exchequer, it has been held that the mere fact of relationship of master to servant, without a neglect of duty, does not impose upon the master a guarantee of the servant's safety.

The plaintiff, however, alleges that there was such neglect on the part of the defendants in not notifying him of what he claims to be the insufficient and dangerous construction of the oven, of which the defendants were aware, but of which the plaintiff was ignorant; and his claim is that he was employed by the defendants to enter this oven which was so defectively constructed that it fell upon and injured him.

Before the plaintiff could be entitled to a recovery upon the allegations set up in his writ, it must be shown that the defendants knew or ought to have known, of the dangerous condition of the oven, and that the plaintiff did not know, or could not reasonably be held to have known of the defect, if such it was, which led to the injury. Knowledge on the part of the defendants, or such lack of it as would render them culpably liable, and ignorance on the part of the plaintiff, of the alleged danger or defect, are essential prerequisites to the maintenance of this action. Beach on Contrib. Neg. § 123. Sherm. & Red. on Neg. § 99.

Thus, in the recent case of *Griffiths v. London & St. Katharine Docks Co.* 12 Q. B. Div. 495, afterwards affirmed in the High Court of Appeal, 13 Q. B. Div. 259, the plaintiff at the time of the accident was in the employment of the defendant company when one of the large iron doors upon the defendant's premises where the plaintiff was at work suddenly gave way and fell upon the plaintiff; the court there say: "If the master employs a

servant to do work for him, not knowing of any special or latent danger in the work, the servant takes the consequence of any danger there may be in it. The master does not mislead the servant, but only avails himself of his voluntary service. On the other hand, if the master knows of danger which the servant does not, it is clearly the duty of the master to communicate his knowledge of the danger to the servant. If the master requires the servant to do something out of the ordinary course of his employment and dangerous, the servant may disobey him. It is clearly the duty of the master to communicate a danger which he knows and which the servant does not. It is necessary to allege that the servant does not know of the danger, because if the servant knows of the danger and does the act which may and does cause injury to him, he has nothing to complain of, and cannot bring an action for the damage sustained." From the numerous decisions sustaining the doctrine above laid down, we select a few of the most important ones in different courts. *Welfare v. Brighton Railway Co.* L. R. 4 Q. B. 696; *Priestely v. Fowler*, 3 M. & W. 1; *Indianapolis Railroad Co. v. Love*, 10 Ind. 554; *Wright v. New York Central R. R. Co.* 25 N. Y. 566; *Hayden v. Smithville M'f'g Co.* 29 Conn. 548; *Buzzell v. Laconia M'f'g Co.* 48 Maine, 113; *Hull v. Hall*, 78 Maine, 114.

In the case of *Indianapolis Railroad Co. v. Love*, 10 Ind. 554, the court held that the corporation was liable in allowing an employee to pass over a defective bridge, known to the corporation, and not known to the servant. If the company knows, or both the company and servant know, the company is not liable unless it gives special directions, remarks the court in that case.

It was said in *Wheeler v. Wason M'f'g Co.* 135 Mass. 298, that where the servant is as well acquainted as the master with the dangerous nature of the service in which he is engaged, he can not recover. And the early case of *Priestely v. Fowler*, 3 M. & W. 1, was where an action was brought by a servant against the master for injuries received in consequence of the breaking down of an overloaded van, and it was held that the master was not liable, because the fact that the van was overloaded was as well known to the servant as to the master.

So in *Welfare v. Brighton Railway Co.*, L. R. 4 Q. B. 696, COCKBURN, C. J., said: "In order to make out negligence on the part of the company, and make the company liable for allowing that person to go on the roof, the plaintiff must show either that the company knew or had the means of knowing, or were bound to take steps to know, the state in which the roof was. As to that the case is entirely bare of all evidence. It does not at all follow that because the roof of a building may require repairing, and a workman is directed to go on it to repair it, the person giving the direction knows that the roof is in such a state that if the workman steps upon it, it may give way under him."

Applying the foregoing principles to the case at bar, with all the evidence before us, we are satisfied that the verdict can not stand. There is no evidence upon which a jury could properly find that the defendants knew of any dangerous condition of the oven at the time the plaintiff met with the accident. If the construction was defective, there is no evidence that the defendants knew of it, or that it was of such a character that the lack of knowledge was culpable.

The oven had been recently rebuilt by the party who leased the premises to the defendants. The defendants neither employed nor paid the party who built it, nor was it built under their inspection or superintendence. The cause of the falling in of the oven seems to be shrouded in a mystery which neither the evidence nor the counsel upon either side is able to explain, and it is left uncertain whether it fell from any inherent defect, or from some act of the plaintiff, as a moving cause, while at work within it.

Nor do we think that the fact of the oven having been cracked and some of the bricks around the fire-box having melted the previous summer, renders the defendants chargeable with knowledge of any defect or dangerous condition of the oven in which the accident happened. This was a new oven. The defect existing the year before was no longer in existence. It was not in fact the same oven that was there the year before. As well might it be said that a town should be held to have knowledge of

a defect in a way, that existed the year before, when the way the next year and before the accident had been entirely rebuilt.

What greater knowledge of the condition of this oven could the defendants have had than the plaintiff himself? They had no greater opportunity for examining the inside of it than the plaintiff; it was completely filled with sand, placed there when it was constructed, and the plaintiff's employment was to remove it. What examination would have revealed the fact that the arch would fall after the sand was removed, except by such removal?

If the plaintiff had equal knowledge with the defendants before he commenced the work, then he must be considered as assuming the risk, and consequently the defendants would not be liable. *Beaulieu v. Portland Co.* 48 Maine, 296; *Shanny v. Androscoggin Mills*, 66 Maine, 428.

Motion sustained and verdict set aside.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

STATE OF MAINE vs. JESSE S. SMITH and others.

Penobscot. Opinion May 25, 1886.

Trespass. Persons authorizing. Public lands. Permits.

Those who authorize the commission of a trespass are equally responsible as those by whose acts the trespass is committed.

The assessors of a plantation were authorized by the land agent to guard certain lots, reserved for public uses, against trespassers. They had no right nor authority to permit or sell timber or other property from the lots. After exploring the lots, supposing they had such authority, they gave permits in writing to certain parties to take off the hemlock bark and timber from the lots. The permits were assigned to other parties who subsequently peeled the bark, and cut and carried away a portion of the timber, for which acts an action of trespass was brought against the assessors, and they were held liable.

ON REPORT.

Trespass against the assessors of Silver Ridge Plantation for timber and bark cut from lots reserved for public uses in that plantation under permits given by them in 1879. The writ was dated November 8, 1883. The opinion states the material facts.

Charles Hamlin and *Jasper Hutchings*, for the plaintiff, cited: R. S., c. 5, § 10; 2 Greenl. Ev. § § 613, 615; *Wall v. Osborn*, 12 Wend. 39; *Guille v. Swan*, 19 Johns. 382; *Scott v. Shepard*, 2 Black. R. 892; *Leame v. Bray*, 3 East, 595; *Morgan v. Varick*, 8 Wend. 594; 7 Cowan, 613; 10 Mass. 125; *Libby v. Soule*, 13 Maine, 310; *Cram v. Thissell*, 35 Maine, 88; *Jones v. Lowell*, 35 Maine, 541; *Woodbridge v. Conner*, 49 Maine, 353; *Lincoln v. Worcester*, 8 Cush. 59.

A. W. Paine, for the defendants.

At most the defendants have signed a document, having no force in law purporting to give a license, merely a permission, to do an act which upon its face they had no right to do or sign, and somebody has unwittingly taken advantage of the license, to the injury of a third person. Can such third person come into court and legally demand for such illegal act?

At most the permit was not a *causa causans*. It was of that class which flows not naturally from the acts of the defendants so as to be within the *proxima causa* class which the court will respect. See cases collected by Broom's Legal Maxims, 205-7, 215, 227.

The relation of cause and effect can not be made out by including illegal acts of third persons. Hilliard on Torts, 92, § 9. *Non constat*, by any means, that because one gives another permission to do a thing that *ergo* he will do it, to the injury of another. The case at bar is strikingly of the same class and character as those used by Greenleaf, in illustration of the rule now repeated or alluded to. 2 Greenl. on Ev. § 256.

There must be either the relation of master and servant or principal and agent in order to create such liability, or some positive direction such as made by the acting party, an agent or servant in effect. *Bachelor v. Pinkham*, 68 Maine, 255. *Eaton v. E. & N. A. R. R. Co.* 59 Maine, 520, is full of authority to this point, "unless the relation of master and servant exists the party contracting is not responsible for the negligent or tortious acts of the person, with whom the contract is made." The subsequent case of *Tibbetts v. Knox & L. R. R.* 62 Maine, 437, is to the same effect. If the employment of one to do a

particular work does not render the employer liable for the injury in such case, how can the simple permitter in a case like this be held responsible. *Doughty v. P. L. D. Co.* 76 Maine, 143, and cases cited.

The master in such cases is liable for the servant in the course of his employment, but only to the extent of his employment. *Brown on Dom. Rel.* 136; *Kimball v. Cushman*, 103 Mass. 194; *Wood v. Cobb*, 13 Allen, 58.

The relation of a contractor however does not raise any such liability. So that our case would not come within the principle. *Brown on Dom. Rel.* 136; *McCarthy v. 2nd Parish*, 71 Maine, 318; *King v. N. Y. C. R.* 66 N. Y. 181.

The relation of permitter and permittee is of the same character as lessor and lessee. But it is well established that a lessor is not liable for the tortious acts of his lessee. This was fully settled in the case of *Dwinel v. Veazie*, 44 Maine, 176; *Rich v. Basterfield*, 56 E. C. L. 783; *Earle v. Hall*, 2 Met. 353; *Hilliard v. Richardson*, 3 Gray, 349.

Another good illustration is found in the case of one who has conveyed land by deed to another, he having no title but supposing at the time that he had. In such case the actual owner has no claim for damages against the grantor for trespass committed by grantee under this deed. *Sullivan v. Davis*, 29 Kan. 28; *Ward v. Cape R. Iron Co.* 50 Mich. 522.

Again, the case of an officer making an attachment by general orders of plaintiff against property of a third person is another good illustration of our position. If under such general orders he makes such attachment, the plaintiff is not liable, however he might be if he indemnified the officer for attaching the specific property named. *Murray v. Lovejoy*, 2 Clifford, 191; *Lovejoy v. Murray*, 3 Wall. 1; *Herring v. Hoppock*, 15 N. Y. 409; *Barker v. Stetson*, 7 Gray, 53; *Elliott v. Hayden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 458.

Again "the mere intent of the defendant in trespass is not material if his conduct was not actionable." *Estey v. Smith*, 45 Mich. 402.

In the case of *Robinson v. Vaughton*, 8 C. & P. 252; 34 E.

C. L. 376, we have a case directly in point, where ALDERSON, B., says: "If I give a man leave to go on a field over which I have no right and he goes, that will not make me a trespasser. But if I desire him to go and do it, and he does it, that is a doing of it by my authority, which is quite a different thing and I should be liable."

The distinction drawn in *Nowell v. Wright*, 3 Allen, 166, between the classes of public officers that are liable and those that are not, very clearly places our case on the non-liable side. *White v. Phillipston*, 10 Met. 108; *Williams v. Adams*, 3 Allen, 171; *Spear v. Cummings*, 23 Pick. 224; *Keenan v. Southworth*, 110 Mass. 474.

FOSTER, J. The defendants were authorized by the land agent to guard certain lots reserved for public uses in Silver Ridge Plantation against trespassers. They had no right or authority to permit or sell timber or other property from these public lots. As assessors of that plantation in 1879, supposing they had such right, after exploring the lots, they permitted all the hemlock bark on one of said lots to one St. John for one hundred dollars. The permittee assigned his contract to Shaw Brothers, who, during that and the three following years, cut down the hemlock and carried away the bark, leaving the trees.

Two weeks after the first permit the defendants by another writing signed by them, permitted all the growth on these public lots, subject to the contract assigned to Shaws, to Jesse S. Smith, one of their own number, for five hundred dollars, but which was never paid. Smith thereafter assigned his contract to one Johnson who cut and carried away, during the years named spruce and cedar timber and removed the hemlock trees left by the Shaws. In all the lumbering operations upon the lots Smith acted as scaler.

For the trespasses committed by the Shaws and Johnson, the plaintiff claims to hold the defendants personally liable; and the real question at issue is whether they are liable or not. We are satisfied that they are liable. This action is for trespass to the real estate, with a count *de bonis* for the timber and bark

carried away, under R. S., c. 5, § 10, which permits suits in favor of the state to be brought in any county. It is undisputed that the title to the lots in question is in the plaintiff, as well as the possession thereof through the land agent who, by virtue of § 15 of the same chapter, "shall have the care of the reserved lands in all townships or tracts until they are incorporated and the fee becomes vested in the town."

The defendants not only entered upon and explored the lands, but they authorized the cutting and removal of the timber and bark. Whatever may have been their intention is immaterial in this suit. If what they did in authorizing others to enter upon and remove the timber and bark from the lots naturally and ordinarily produced the acts complained of, which constitute the alleged trespasses, then they are liable in trespass for those acts. *Sutton v. Clark*, 6 Taun. 29; 1 Waterman on Tres. § 62. The principle upon which one man is held liable for the acts of others is thus laid down in *Guille v. Swan*, 19 John, 382, where the court say: "To render one man liable in trespass for the acts of others, it must appear either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally produced the acts of the others."

In *Wall v. Osborn*, 12 Wend. 39, the same principle is recognized, and the doctrine affirmed that one who does an unlawful act is considered as the doer of all that follows, and the prime mover of the damages that result, and accordingly it was there held, that where a party sold a mill standing upon the lot of his neighbor, and appointed a day for the purchaser to take it away, promising to aid him in its removal if assistance was necessary, and the mill was subsequently taken down and removed by the purchaser, that the vendor was liable to an action of trespass, although there was no proof of his being present or aiding in the removal of the building. "By the act of selling the plaintiffs' property," remarks SAVAGE, C. J., "the defendant assumed a control over it, and by appointing the time for the removal of the mill he virtually directed the purchaser to take it away."

So in *Morgan v. Varick*, 8 Wend. 594, the defendant sold

the plaintiffs' steam engine and requested the purchaser to take it away, and he was held liable in trespass, the court there holding that any unwarrantable and unauthorized interference with the property of another will constitute the party a trespasser. And it has been held that if one sell timber upon the land of another, and the purchaser cut and remove it, the seller is a trespasser. *Dreyer v. Ming*, 23 Miss. 434.

The party is held liable in such cases on the principle that he who does an act by another does it himself; it may not be the work of his hands, yet it is the result of his will and his purposes which are the efficient cause of the operations conducted by others. The case of *Scott v. Shepard*, 2 W. Black. 892, where the defendant started the lighted squib, and it was thrown into a market house where a large concourse of people had assembled, is a strong instance of the responsibility of an individual who was the first, though not the immediate, agency in producing an injury. Another instance is the case of *Guille v. Swan*, *supra*, where the defendant ascended in a balloon which descended a short distance from the place of ascent into the plaintiff's garden, and the defendant calling for help, a crowd of people broke through the fences into the plaintiff's garden beating and treading down his vegetables and flowers; it was held that inasmuch as the act of the defendant would ordinarily and naturally draw the crowd into the garden, he was answerable in trespass for all the damage done to the garden.

In the case now before us the defendants without right or authority assumed dominion and control over property belonging to the plaintiff. They authorized the cutting and removal of the timber and bark from the public lots, which they had no right to do. The fact that they supposed they had such right renders them none the less trespassers. As was said by SPENCER, C. J., in *Guille v. Swan*, *supra*: "The intent with which an act is done, is by no means the test of the liability of a party to an action of trespass." To be sure the permits were not such as could lawfully be given under the statute in relation to timber upon public lots, inasmuch as the right to grant permits

lies with the land agent and with no one else. Nevertheless they may be effectual for the purpose of establishing the defendants' liability in authorizing the commission of those wrongful acts which are the basis of this suit. Nor do they alone serve in rendering the defendants liable as authorizing the trespasses, but the defendants in giving these permits must be held to have ordinarily and naturally produced the acts which constitute the alleged trespasses — the cutting and removal of the timber and bark from the lots.

In *Herring v. Hoppock*, 15 N. Y. 413, a bond of indemnity had been given to the officer, and the question was whether the defendant, by giving the bond of indemnity, had rendered himself liable in trespass for the acts of the officer; and it was there held that the giving of the indemnity naturally produced the act of the wrongful sale of the property by the officer, and must be regarded as the principal if not the sole cause of it.

Also in *Lovejoy v. Murray*, 3 Wall. 1, the court held that in the giving of a bond of indemnity whereby the officer was induced to hold property not subject to attachment made the party a joint trespasser with the officer as to all that was done with the property afterwards.

The permits in this case were in effect not mere licenses, but were executory contracts for the sale of the timber and bark therein named, with permission to enter and remove the same. *Banton v. Shorey*, 77 Maine, 51. Such undoubtedly was the understanding of the defendants, as well as of those to whom they were given, and who are termed "grantees." The defendants received from the permittees pay for their services in exploring the lots before the permits were given; and Smith, one of the defendants, was scaler during all the lumbering operations.

This case is unlike *Robinson v. Vaughton*, 8 C. & P. 252, (34 E. C. L. 376) cited by the counsel for the defendants. In that case, which was trespass for breaking and entering the plaintiff's close with a gun and pointer in pursuit of game, there was no such dominion over the property and unauthorized acts of ownership as in this case, and yet the court there say that if

one party authorized and ordered the other to go upon the premises, they would be joint trespassers.

Numerous cases are cited by the learned counsel for the defendants to the effect, as he claims, that they cannot be held responsible for the acts of those who cut and removed the timber, inasmuch as those parties sustained the relation of contractors rather than that of servants or agents of these defendants. Undoubtedly that position might be tenable in a case where the defendants were sought to be held for the negligence of such persons in the performance of a legal act. Such is the doctrine of the cases cited. And the case of *Eaton v. E. & N. A. R. R. Co.* 59 Maine, 520, to which our attention has been particularly called, recognizes the distinction, in this class of cases, between the performance of a legal and an illegal act, holding, in accordance with the authorities, that in the execution of a wrongful or illegal act, the employer is not exempt from liability but is responsible for the wrong done by the contractor or his servants. In that opinion APPLETON, C. J., says: "Though a person employing a contractor is not responsible for the negligence or misconduct of the contractor or his servants in executing the act, yet if the act is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons for damages sustained by such wrong doing. *Ellis v. Sheffield Gas Consumer Co.* 75 E. C. L. 767. So if, in the present case, the contract was to do a wrongful act, the defendants must be held liable for damages occasioned thereby. Or, if the defendant's engineer directed the contractors to do what was illegal and unauthorized, as by working outside of the limits of the true location, the defendants must be held liable for any trespasses thus committed."

So one who directs or authorizes a trespass to be done is liable. *Bachelor v. Pinkham*, 68 Maine, 255.

"The general rule is, that in actions of tort all persons concerned in the wrong are liable to be charged as principals." TINDAL, C. J., *Cranch v. White*, 1 Bing. N. C. 414 (27 E. C. L. 440); *Cram v. Thissell*, 35 Maine, 88.

The defendants in this case, whatever may be their legal relation to the parties actually cutting and removing the timber, must be considered as having authorized those wrongful and illegal acts which were but the natural and ordinary consequences of their own wrong doings.

Inasmuch as we have stated the grounds upon which the defendants have rendered themselves liable in this action, it is unnecessary to consider in detail all the objections set up in defence.

Therefore the only remaining question is that in relation to damages. By the terms of the report, that is to be only the current market value of the stumpage, which is admitted to be two thousand eight hundred and thirty-seven dollars, for the timber and bark; and to which sum, as by the report, is to be added the sum of two hundred ninety-seven dollars and seventeen cents as interest, making in all three thousand one hundred thirty-four dollars and seventeen cents.

Judgment for the plaintiff for \$3,134.17.

PETERS, C. J., WALTON, DANFORTH, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

NATIONAL LIFE INSURANCE COMPANY.

vs.

ABRAM HALEY, administrator, and W. C. PALMER, administrator.

York. Opinion May 26, 1886.

Life insurance. Lapsed policy. Beneficiary. Change of beneficiary.

The insurance company, on the twenty-ninth day of March, 1869, issued its policy of insurance, No. 4091, for the sum of one thousand dollars, upon the life of Charles J. Haley, payable upon his death to his wife, Julia A. Haley, her heirs, executors, administrators, or assigns, requiring quarterly premiums of four dollars and eighty-eight cents. During her life she paid premiums, amounting to one hundred and sixty-five dollars and ninety-two cents. Upon her death in March, 1877, in order that Charles J. Haley might acquire to his own use the benefits of the policy of insurance, he and the company contrived together to allow the policy to lapse from non-payment of premiums, and the company issued to Charles J. Haley a new policy of insurance for the same amount, requiring the same quarterly premiums, payable to him or his legal representatives, dated October 12th, 1877,

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86	124
78	268
97	553
97	554

numbered 32,705. Upon the new policy he paid in premiums the sum of seventy-eight dollars and eight cents, and died in September, 1881. Policy No. 4091 was not given or assigned to Charles J. Haley and it was a part of the consideration for policy No. 32,705. *Held*, on a bill of interpleader by the company upon which the respective administrators of the estates of Julia A. Haley and Charles J. Haley were required to interplead, that the insurance money be divided between the administrators in the proportion to the amount of premiums paid by their respective intestates.

BILL of interpleader. At a hearing on the bill it was ordered that the plaintiff pay the money into court and that the respondents interplead — that the respondent, Palmer, set out his claim in the form of an original bill and the respondent, Haley, answer thereto.

Upon the issue thus formed, after hearing, the court decreed that the orator pay into court the additional sum of \$47.53 as interest and pay the taxable costs on a suit at law amounting to \$14.02, and the orator receive from the fund its costs and counsel fees amounting to \$80.50; and that the clerk, after paying to each of the respondents his taxable costs and retaining for his own fees one per cent of the fund, should divide the fund between the respondents in the proportion that their respective intestates had contributed and paid in premiums therefor. From this decree an appeal was taken, but the report does not state by whom.

The material facts are stated in the opinion.

Drummond and Drummond, for the plaintiff.

H. R. Virgin, for the respondent, Palmer.

Policy No. 4091 descended to the heirs of Julia A. Haley at her death. *Libby v. Libby*, 37 Maine, 360.

Her husband had no interest in it. *Cragin v. Cragin*, 66 Maine, 519; *Gould v. Emerson*, 99 Mass. 157; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 159; *Swan v. Snow*, 11 Allen, 226; *Mullins v. Thompson*, 51 Tex. 7.

He did not, by surrendering that policy and taking out the new one, divest the interest of the heirs of his wife. *Chapin v. Fellowes*, 36 Conn. 132; May, Insurance, 589; Bliss, Life Ins. § 339; *Fraternity M. Life Ins. Co. v. Applegate*, 7 Ohio St. 292; *Hogle v. Guardian Life Ins. Co.* 6 Robertson, 567; *Packard v. Conn. Mut Life Ins. Co.* 9 Mo. App. 469.

Where fraud is committed in obtaining a conveyance the grantee or assignee will be considered, in equity, a trustee for the real owner. 1 Greenl. Cruise, 378, 379; Bliss Life Ins. § 349; Story Eq. Jur. Vol. 1, §§ 321, 322; Vol. 2, §§ 1261, 1262, 1263, 1265; *Arnold v. Brown*; 24 Pick. 96; 4 Kent's Com. (12 ed.) *438.

Hamilton and Haley, for the respondent, Haley.

The policy upon which the money was paid into court, having been issued for the benefit of Charles J. Haley's estate, unless William C. Palmer can bring his claim within the rule of trusts it must fail.

And to bring his case within this rule he claims that the correspondence between Charles J. Haley and the insurance company shows such a fraud against the heirs of Julia A. Haley as to raise a trust in their favor.

There was no express trust. Perry on Trusts, § 24. Nor implied trust. *Id.* § 25. Nor resulting trusts. *Id.* § 26; Story Eq. § 1203; 53 Maine, 408; 30 Maine, 121; 14 Gray, 121; 114 Mass. 526; Perry, Trusts, §§ 128, 135, 27.

The cases cited by Bliss on Life Insurance, in which he lays down the rule referred to by counsel for Palmer, were all cases where the fiduciary relationship existed and the policies were surrendered before they were forfeited.

LIBBEY, J. This is a bill of interpleader brought by the National Life Insurance Company against Abram Haley, administrator of the estate of Charles J. Haley, deceased, and Wm. C. Palmer, administrator of the estate of Julia A. Haley, deceased, to try the title to the insurance of one thousand dollars, by a life policy issued by the complainant on the life of said Charles J. Haley.

A decree was made requiring the said Abram Haley and Palmer to interplead, and upon the pleadings being filed the case was tried at *nisi prius*, and the presiding judge with the aid of special findings by a jury, found the facts as follows:

The orator on the twenty-ninth day of March, 1869, issued its policy of insurance No. 4,091, for the sum of \$1,000, upon the

life of Charles J. Haley, payable upon his death, to his wife Julia A. Haley, her heirs, executors, administrators, or assigns, requiring quarter yearly premiums of \$4.88; and during the life of said Julia, she paid the premiums amounting to \$165.92, and that upon her death in March, 1877, in order that the said Charles J. Haley might acquire to his own use the benefits of said policy of insurance, he and the orator contrived together to allow said policy to lapse from non-payment of premiums, and then said company issued to said Charles J. Haley a new policy of insurance for the same amount, requiring the same quarterly premiums, payable to said Charles, or his legal representatives, dated October 12th, 1877; numbered 32,705. That upon said new policy the said Charles paid in premiums the sum of \$78.08, and died in September, 1881; that policy No. 4,091 was not given or assigned to Charles J. Haley; that Julia A. Haley had an interest in that policy at the time of her decease; that the heirs of Julia A. Haley had an interest in policy No. 32,705 and that there was other consideration for that policy besides what was expressed in it, the policy No. 4,091 being a part of said consideration.

The judge thereupon decreed among other things, that the insurance be divided between the said claimants in the proportions of the amounts of premiums paid by said Julia A. and Charles J. Haley.

Upon this part of the decree the whole contention between the parties arises; Palmer claiming that the estate of Charles J. is entitled to the whole amount of the policy, or at least to said sum less the amount of premiums paid by Julia A. for which amount her heirs, by the terms of the first policy, were entitled to a paid up policy, while on the other side it is claimed that the estate of Julia A. is entitled to the whole sum insured.

We think the decree below, on the facts of this case is correct. The first question that arises is, was policy No. 4,091 forfeited by the devices resorted to by the insurance company and Charles J. Haley, so that the heirs of Julia A. Haley no longer had any interest in the insurance? We think not. Charles J. Haley and the insurance company had no legal power by direct agreement

to change the beneficiaries named in the policy. This proposition is too well settled to require citation of authorities. They could not accomplish indirectly by the means resorted to, without the knowledge or consent of the heirs of Julia A. what they had no power to do by direct agreement. No such knowledge or consent is shown.

We are aware that there is an apparent conflict among the authorities upon this subject. But we think an examination of the decided cases will show that the apparent conflict arises more out of the variant facts acted on by the courts in the different cases, than from any essential difference in the principles of law applied to them. But if there is a real conflict we think there is a decided preponderance of authority in support of the rule we apply to this case. The question was very carefully and ably considered in *Barry v. Brune*, 71 N. Y. 261, in which the facts raised the same question under consideration, and the court held that the means used to cause the first policy to lapse, and a new one to be issued of like tenor, excepting the name of the beneficiary, were ineffectual to extinguish the right of Mrs. Barry, the beneficiary named in the first policy, to the insurance. In the opinion of the court, EARL, J., says, "It is clear that the old policies were the consideration of and inducement to, the new policies. The new policies could not have been obtained but for the possession and surrender by Brune of the old policies, and the premiums upon the new policies were paid, in part, by a cash dividend due upon one of the old policies. Brune thus, by means of the possession of the old policies, which belonged to the plaintiff and by using and surrendering them, obtained the new policies. The real substance of the transaction was a substitution of the new policies for the old, for the purpose of getting the security which the old did not give him; under the circumstances of this case both upon reason and authority, the substituted policies, in equity, simply take the place of the old policies and the money payable thereon must go to the party entitled under the old policies. For this conclusion there is abundant reason and authority." The same rule is held in *Chapin v. Fellowes*, 36 Conn. 132; *Lemon v. The Phoenix Life Ins. Co.* 38 Conn.

294, and *Timayenis v. Union M. L. Ins. Co.* Circuit Court U. S. Southern Dist. N. Y., reported in Fed. Rep. vol. 21, No. 4, p. 223. In the latter case the facts were similiar to this case, except that the beneficiary did not procure the first policy and paid no part of the premiums.

The attempt to change the beneficiary named in the first policy being ineffectual the remaining question is how shall the sum due on the policy be divided? Courts have generally held that the beneficiary named in the first policy is entitled to the whole, but we think the facts in this case are, to some extent, different from those acted on by the courts which have so held. So far as we have observed where it has been so held the facts were such that the beneficiary might well expect that the premiums were being paid by the person who had commenced paying them. In this case, prior to the death of Julia A. Haley, the premiums had all been paid by her. After her death her heirs had no reason to expect that Charles J. Haley would pay them. He was in no way liable for them. He paid them under a claim that he should have the benefit of them. This the heirs of Julia A. might have known in the exercise of due diligence in their affairs. What they might have learned in the exercise of due diligence equity will treat them as knowing. The insurance, then, was earned by the premiums paid by Julia A. Haley, for the benefit of herself and her heirs, and by the premiums paid by Charles J. Haley after her death for his own benefit. Upon the facts of this case we think the rule adopted by the court below is in accordance with the equitable rights of the parties, and that the fund should be divided between the two estates in proportion to the amount of premiums paid by each intestate. This is the rule adopted by WALLACE, J., in *Timayenis v. Union M. L. Ins. Co. supra.*

Decree below affirmed.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

LEWISTON STEAM MILL COMPANY

vs.

ANDROSCOGGIN WATER POWER COMPANY.

Androscoggin. Opinion June 7, 1886.

Expert testimony. Reasons.

An expert may give his reasons for his opinion in his examination in chief as well as the opinion itself.

ON EXCEPTIONS.

The opinion states the case. The verdict was for the plaintiff for the sum of nine hundred and sixty-three dollars and four cents.

Savage and Oakes, for the plaintiff.

It is not open to one who uses an expert to bolster up his opinions by giving his reasons. On cross-examination they may be inquired into or not as the cross-examiner chooses. The expert's opinion simply is all that he is permitted to give on direct examination.

Frye, Cotton and White, and *Newell and Judkins*, for the defendant cited: *Sexton v. Bridgewater*, 116 Mass. 200.

VIRGIN, J. This is an action on the case brought under the provisions of R. S., c. 42, § 6, to recover a reasonable compensation for driving, in the spring of 1884, from Gilead and other landings below, on the Androscoggin river, to Canton and Lewiston, a certain quantity of the defendant's logs with which those of the plaintiff became so intermixed that they could not be conveniently separated for the purpose of being floated to the place of manufacture.

The plaintiff made two drives, denominated by the witnesses as "head drive" and "rear drive," the former having started April 19, and reached Canton May 9, and the latter several days later, both containing intermixed logs of both parties.

Among other things, the defendant claimed (in the language

of the presiding justice in his charge) "that a head drive was injurious to the defendant because he did not get the remaining portion of his logs so soon as he might otherwise have done," and the judge instructed the jury that they might properly take this matter into consideration.

On this branch of the case the defendant interrogated several expert witnesses, and among them Calvin Turner, who testified that he had charge of drives on that river twenty-three springs, including that of 1884. In answer to a question put by the defendant, objected to by the plaintiff, but admitted by the court, he testified that, taking into consideration the driving pitch on April 19th, it was not good judgment to make a head drive. On being asked by the defendant's counsel for his reasons, he answered, "Because you have the work to do twice; it is going over the ground twice when you would not but once." This answer, on objection by the plaintiff's counsel, was excluded and exception allowed. The plaintiff's only objection urged at the argument was that it is not competent in the examination in chief, to call out the reasons for the opinion of an expert. The opinion only is all that he who asks for it is entitled to, though the reasons or grounds of it may or may not be inquired into on cross-examination.

We are of opinion that the answer was admissible and should not have been excluded. The mere naked opinion of the witness, notwithstanding his large experience and extensive opportunity for observing the facts connected with the driving of that river, might or might not, unexplained, be considered of much weight by the jury; while the grounds of his opinion, though involving simple facts of general notoriety, would enable the jury to "perceive the force of his reasoning, the soundness of his logic, and therefore judge of his capacity to give an opinion on the subject, the correctness of his conclusions, and consequently the weight due to his opinion." *Keith v. Lothrop*, 10 Cush. 453; *Dickenson v. Fitchburg*, 13 Gray, 546; *Lincoln v. Taunton Cop. Co.* 9 Allen, 181; *Sexton v. Bridgewater*, 116 Mass. 200; *Hawkins v. Fall River*, 119 Mass. 94. If the reasons on which the intelligent opinion of an expert is founded

can only be furnished to the jury by cross-examination, this case makes it evident that as wise a counselor as the plaintiff's, would never "give aid and comfort" to his adversary by such a cross-examination.

Exceptions sustained.

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

LIBBEY, J., did not concur.

CITY OF BATH vs. FRANKLIN REED and others, executors.

Sagadahoc. Opinion June 11, 1886.

Assessors of Bath, their election and qualification. Taxes against executors and administrators. Evidence. Exceptions. R. S., c 6, § 142.

An assessor of the city of Bath was elected and qualified in 1880 for three years. In 1883 he was re-elected, but it was denied that he was qualified. In 1884, he resigned and was re-elected for two years, to fill the vacancy, and was duly qualified. *Held,*

1. That if he was not qualified under the 1883 election, he would hold over under his previous election, and that his acts as assessor during that year were valid.

2. That his resignation and re-election in 1884 were legal.

A tax was assessed against the "administrators of the estate of R," when the representative parties were executors and not administrators. *Held,* that this was not a fatal mistake, it being fairly within the scope of R. S., c. 6, § 142; and that parole evidence was admissible to show that the executors were the individuals intended to be taxed.

Exceptions will not be sustained to the admission of evidence which was so immaterial that it could do the excepting party no harm.

ON exceptions by the defendants.

The case is fully stated in the opinion.

Francis Adams and *W. Gilbert*, for the plaintiff, cited: *Dillon, Mun. Corp.* (3d ed.) § § 119, 120, 224; *R. S.*, c. 3, § 32; c. 6, § 142; *Farnsworth Co. v. Rand*, 65 Maine, 19; *Tyler v. Hardwick*, 6 Met. 470; *Westhampton v. Searle*, 127 Mass. 502; *Boothbay v. Race*, 68 Maine, 351.

C. W. Larrabee, for the defendants.

The jury disagreed as to whether John W. Ballou was qualified as an assessor in 1883. On this point the case is no better for

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plaintiff than if it were admitted that he was not qualified, and leaves the naked question whether or not, under the facts in the case he held over, from his election and qualification of 1880. The ruling of the court was "that if said Ballou was duly elected and qualified in 1880, as the records introduced may satisfy you, then he would hold that office until some one was elected and qualified in his stead."

We respectfully submit that this ruling was erroneous. That by the provision of § 6 of the city charter, a vacancy occurred in the board of assessors in three years from March 24, 1880, and that the re-election of Mr. Ballou to that office, March 26, 1883, recognized that fact. Ballou was again elected for the term of two years. The only evidence of resignation came from Mr. Ballou and from Seth O. Rogers. Ballou says, "I had resigned my election in 1883," which means that the resignation of Mr. Ballou was intended to effect his election of 1883. Rogers, the city clerk, says the resignation was in April, 1884. He could not hold the office under both elections at the same time.

The election in 1884 for two years, was not in accordance with the provisions of the amended charter, § 6, *supra*, each member elected to fill the place of one whose term expires shall hold office for the term of three years. If Mr. Ballou held over from 1880, there then was no need of his resignation before election in April, 1884. But the case finds that he was elected in 1883 for the said three years, in accordance with the charter, and his resignation, if it took effect upon any thing, must be referred to the last election. He was elected for two years to fill the vacancy caused by the resignation of John W. Ballou. What vacancy? Indisputably the two years remaining of his election in 1883, if Mr. Ballou had held over, then his election should have been for the three years, instead of two, next after the term of his election in 1880 expired. The action then taken was for the election then held. "No oath, no competency; no competency, there can be no legal assessment." *Dresden v. Goud*, 75 Maine, 299. The charter must govern in this case, and its provisions are imperative. Dillon Mun. Corp. 246.

This action is against Franklin Reed *et als.*, executors of the estate of Thomas M. Reed, and to support it plaintiff introduced the record of the assessment for both years, 1883 and 1884 alike, against "adm'rs," without naming them, of Thomas M. Reed's estate. No objection was raised to the explanation of the abbreviation used, "adm'rs," that it was intended for "administrators," but when the question was asked, "did you recognize any distinction between 'administrators and executors'?" it was seasonably objected to, and we submit that this evidence was admitted against the well established rule of evidence, and that this alone is sufficient to sustain defendants' exceptions. 1 Greenl. Ev. c. 15.

Assessment on real estate to heirs of a deceased testator, who had disposed of all his real estate by will, was held void. (*Inhabitants of Elliott v. Spinney*, 69 Maine, 31.) The distinction between heirs and devisees is not better defined than between administrators and executors.

The testimony of the assessors can have no bearing on this case further than to show that they intended to assess their taxes against the estate of the late Thomas M. Reed, and it would follow that both assessments are void. (*Fairfield v. Woodman*, 76 Maine, 549.) "Extrinsic circumstances also in case of ambiguity are of value in elucidating the true meaning." 2 Wheaton, Law of Evidence, § 940. But here there is no ambiguity, nothing doubtful, but a word of definite sense and meaning is torn from the text and another substituted. It can not be done.

FOSTER, J. The defendants are executors of the last will of Thomas M. Reed, late of Bath, deceased; and this action of debt is brought to recover of them taxes upon the personal property of the deceased, for the years 1883 and 1884. R. S., c. 6, § 175. The jury returned a verdict for six thousand seven hundred and sixty dollars and ninety cents.

The principal questions raised by the defendants' exceptions relate to the legality of the board of assessors for the city of Bath in each of those years, and to the designation of the defendants in the list of assessment.

By § 6 of the city charter, as amended by c. 538 of Special Laws of 1874, it is provided that there shall be a board of three assessors to be elected by the city council, one member of which board is to be elected annually, "and each assessor elected to fill the place of one whose term expires, shall hold office for the term of three years."

Together with other facts, about which there was no controversy at the trial, it appeared that John W. Ballou, at the annual meeting of the city council in 1880, was duly elected and qualified as one of the assessors of the city of Bath for three years. Concerning the election and qualification of the other assessors for that or subsequent years, no question was raised.

At the annual meeting of the city council in 1883, the said Ballou was re-elected and continued to act as assessor with the other members of the board for that year—but whether he ever qualified under that election by having the oath of office administered to him, was one of the strenuously contested questions of fact, and the jury, upon the special interrogatory propounded to them in relation thereto, were unable to find that the oath had been administered to him under the election of 1883.

1. The first instruction of the presiding justice to which exceptions are taken, relates to the board of assessors for 1883, and was to the effect that the assessor whose qualification was called in question, if duly elected and qualified in 1880, and if he failed to take the oath of office in 1883, was nevertheless a legal assessor in that year, as the term for which he was elected in 1880 would continue until some one was elected and qualified in his stead.

Prior to the amendment of 1874, it was provided by § 6 of the city charter that the assessors were to be appointed annually. Although there was no express provision in that section for the continuance beyond the year, yet, there being no restrictive provision, the general statute applied. That statute reads thus: "The assessors and subordinate officers of cities, when their charters do not otherwise provide, shall be chosen on the second Monday of March, annually, or as soon after as practicable, and hold their offices one year therefrom, and until others are chosen and qualified in their stead." R. S., c. 3, § 32.

Had there been no amendment changing the term from one year to three, there could be no doubt but that the officer elected for one year would hold over until the election and qualification of some one in his stead. *Dow v. Bullock*, 13 Gray, 138.

In the case of *Weir v. Bush*, 4 Litt. (Ky.) 433, it was held that where by statute an officer holds for a given term, and until his successor is elected and qualified, he continues in office until his successor is duly elected and qualified, though from failure to elect or from other causes, it is after the expiration of the term.

Even in the absence of any charter or statute provision that the officer of a municipal corporation shall hold over until his successor is elected and qualified, the doctrine of the American courts has strongly inclined to guard against lapses, sometimes unavoidable, and to adopt the analogy of other corporate officers who hold over till their successors are elected, unless the legislative intent to the contrary is clearly manifested. *Dillon*, Munic. Corp. § 158; *Chandler v. Bradish*, 23 Vt. 416; *Tuley v. State*, 1 Ind. 502.

In the case last cited, which was an action upon an official bond against sureties, the court say: "But where by the constitution of the corporation, the officers are elected for a term, and until their successors are elected and qualified, or where they are elected 'for the year ensuing,' and the charter or organic law contains no restrictive clause, the officers may continue to hold and exercise their offices, after the expiration of the year, until they are superseded by the election of other persons in their places."

In Connecticut it was held by HOSMER, C. J., in *McCall v. Byram M'f'g Co.* 6 Conn. 428, that an officer elected for "the year ensuing" is, in the absence of any other restrictive provision, entitled to hold beyond the year, and until he is superseded by the election of another person in his place. See *Cong. Soc. v. Sperry*, 10 Conn. 200; *Kelsey v. Wright*, 1 Root, (Conn.) 83; *People v. Runkel*, 9 Johns. 147; *Trustees v. Hills*, 6 Cow. 23; *Currie v. Medical Assurance Soc.* 4 Hen. and M. (Va.) 315.

The English courts early adopted a stricter rule in reference to the office of mayor or other head officer of the old corpora-

tions in England, holding that the office was annual and expired at the end of the year. But in the case of *Foot v. Prowse*, Str. 625, it was decided in the Exchequer Chamber, and afterwards affirmed in the House of Lords, that though aldermen of Truro were to be elected annually, those words were only directory, and the aldermen continued to be such after the year, and until others were elected.

So in the case of *The Queen v. Corporation of Durham*, 10 Modern, 146, the court of King's Bench said that though a town clerk was to be annually elected, he remains town clerk after the year and until another is chosen; but if it be that he was to be elected for one year *only*, his office would have expired at the end of the year.

We think a correct decision may be reached, however, in the case under consideration, when we compare the amendment with the original charter. The only change of any importance was in the number of years for which the assessors were to be elected. The term was changed from one year to three. Neither the original nor the amended charter expressly restricted the duration of the office to the exact time. It is evident, when we consider the object to be attained as well as the language of the amendment, that all the change intended was the substitution of a triennial for an annual election. The statute provision to which we have referred, and which certainly, prior to the amendment of the charter, was to be read along with it, infusing vigor and strength into its terms, clearly indicates and expresses the legislative intent to provide beyond a peradventure against any lapse of the office of assessors in cities, by reason of a failure either in the election or qualification of those officers at the expiration of the prescribed term of office. And if, upon examination of the charter, it might be said that the assessors are subordinate officers, then by § 4 of the charter, express provision is made whereby such officers shall hold their office until others shall be elected and qualified in their stead.

2. Nor do we think that exceptions should be sustained to the instruction in relation to the resignation and election of said Ballou in 1884. The fact that he had continued to act as assessor

during the previous year would not preclude him from resigning whenever he saw fit. There was evidence of such resignation. That the city council by treating the office as vacant and proceeding immediately to fill it by re-electing him to it, as appears by the records, may well be considered as evidence of the acceptance of such resignation. The election for the term of two years was properly made. An election for three years applies only to the case of one who is "elected to fill the place of one whose term expires."

3. By R. S., c. 6, § 14, par. 8, "the personal property of deceased persons, in the hands of their executors or administrators, not distributed, shall be assessed to the executors or administrators in the town where the deceased last dwelt."

The assessment of the taxes sought to be recovered in this action is not against these defendants by name. The assessment is in these words: "Reed, Thomas M., adm'rs of the estate of," and which by proper transposition means nothing more nor less than that the assessment was made to the administrators of the estate of Thomas M. Reed. The defendants were not in fact administrators, but were executors. This evident mistake in the designation of the defendants' representative capacity is fairly within the scope and spirit of § 142, c. 6, R. S., and is one of the evils intended to be remedied by it. By that statute the legislative intention may be clearly discerned, and by it, it is as emphatically and conclusively expressed, that no error, mistake, or omission of the assessors or officers, shall render an assessment void,—but the tax payer suffering in his legal rights on account of such error, mistake or omission, is remitted to a suit against the town for redress. *Boothbay v. Race*, 68 Maine, 356.

The language of this court in the case of *Farnsworth Co. v. Rand*, 65 Maine, 23, applies with appropriate force in this connection. "If the party is liable to taxation," says BARROWS, J., "and is in fact the party whom the assessors intended to tax, it would be manifestly unjust that he should escape taxation for so trivial a cause as an error, mistake or omission in his designation, when his identity with the party designed to be taxed can be established."

Parol evidence was therefore admissible and properly received to show who were intended to be taxed by the words, "Reed, Thomas M., adm'rs of the estate of," and as to the identity of the defendants with the persons intended to be designated by these words. *Tyler v. Hardwick*, 6 Met. 474; *Westhampton v. Searle*, 127 Mass. 504; *Farnsworth Co. v. Rand*, 65 Maine, 23, 24.

This case is clearly distinguishable from the case of *Elliot v. Spinney*, 69 Maine, 31, in which the tax was upon real estate, and the assessment was in fact made against parties not legally liable. In that case the only question was whether certain real estate was rightfully taxed to the heirs of the deceased, and against whom the suit was brought, when it had in fact been given to devisees. Here, the action is for taxes upon personal property of the deceased, and against parties legally liable under the statute.

Nor is this case like that of *Fairfield v. Woodman*, 76 Maine, 549, where both real and personal property was taxed, not to the defendant in the action, but to the "estate of" the deceased, when there was no statute authorizing the assessment of the tax to the "estate of" the deceased.

In the case of *Tyler v. Hardwick*, *supra*, the action was to recover back a tax paid by compulsion where neither the christian nor surname was borne on either the valuation or the assessment lists, when made and deposited in the assessors' office, nor when the tax was committed to the collector. SHAW, C. J., who drew the opinion of the court, there recognized the importance that those liable to taxation should bear their just proportion of the public burdens, as well as share the benefits of taxation upon others, and that they should not escape by subtle technicalities, or slight mistakes which the law makers had declared should not vitiate proceedings of this nature, and he there held that the statute covers all cases of error in the name and applies to cases where the mistake arises from the name being omitted as well as to cases of misnomer. "The statute," he said, "is plain and explicit, and covers all cases of error in the name, and was intended, we think,*to apply to a case where the name is

mistaken by omitting, as well as by adding or by misnaming. The only things required are, that the person shall be liable to taxation, and be in fact the person intended to be taxed under such designation. These facts must of necessity be proved by evidence *aliunde*. The fact of the identity of the party, and the intention of the assessors, must in general be proved by them."

Now while it may be true that this statute of our own state may not be in terms so specific as that of Massachusetts, it has received a construction and has been held by this court in *Farnsworth Co. v. Rand*, *supra*, where the above case was cited with approval by Mr. Justice BARROWS, to be even more comprehensive, and to apply with equal force and precision to actions of this kind.

Again, it must be borne in mind that this is an action against the parties made liable by law for the payment of taxes properly assessed upon property in their hands. Strict construction in matters of this kind are properly applied to prevent forfeitures. But, as was said by PETERS, C. J., in the very recent case of *Cressey v. Parks*, 76 Maine, 534, "where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally."

4. The remaining exception to which our attention is called, relates to the admission of the question put to the assessors by the counsel for the plaintiff,—whether or not in making the assessment they recognized any distinction between the words administrators and executors. The question is immaterial. They were not asked whether there was in fact any distinction between the words, but simply whether they recognized any distinction. It was not admitting evidence by parol to vary or control that which is written. Whichever way the question may have been answered was wholly immaterial, and certainly could do the defendants no harm. *Harriman v. Sanger*, 67 Maine, 442.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

GEORGE H. WILLS vs. WILLIAM W. CHURCHILL.

Franklin. Opinion June 11, 1886.

Pleadings. Declaration. Account annexed. Demurrer.

The office of a declaration is to make known to the opposite party and the court, the claim set up by the plaintiff.

The account annexed to a declaration in assumpsit contained the following items under different dates: "Labor, \$2.00"; "Shingle machine, 100.00"; "Pd. freight, 5.00"; "To labor, 3.35". *Held*, on demurrer, declaration adjudged good.

ON EXCEPTIONS.

Assumpsit on the following account annexed :

Farmington, April 21, 1884.

WM. W. CHURCHILL,

1881.	To	GEO. H. WILLS,	Dr.	
June 1,	Labor,		\$	2.00
June 11,	Shingle machine,			100.00
July 5,	Paid freight,			5.00
1882.				
Jan'y 6,	To labor,		3.35	110.35
1881.				
July 15,	Cr. By lumber,	50.00		50.00
				<hr/>
		Balance due,		60.35

The defendant filed a demurrer to the declaration alleging as a cause that the first, third and fourth items were not properly stated. The demurrer was overruled by the presiding justice and the defendant alleged exceptions.

E. O. Greenleaf, for the plaintiff, submitted without argument.

J. C. Holman, for the defendant.

I think the demurrer should be sustained. I do not think the first, third, and fourth items are sufficiently definite in the account annexed to the writ. If the first item "labor" is good for two dollars it is good for one hundred dollars. It does not state whether it is his own personal labor, or the labor of some one else, or whether it is for that of some domestic animal, or

whether it was performed at one and the same time, or the kind of labor; also, same reasoning as to fourth item. The same reasoning applies to the charge "Pd. freight." For aught that appears it may have been paid at different times and in different items. If so an amendment is necessary, and it seems to me that an inspection of the writ shows an amendment necessary. I reply upon case of *Bennett v. Davis*, 62 Maine, 544, and cases there cited.

What protection would a record of this kind be to a defendant for another action by the same party properly stated?

FOSTER, J. The declaration in this case is sufficiently definite to apprise the defendant of the nature of the plaintiff's claim. It is not open to the objections which were sustained in *Bennett v. Davis*, 62 Maine, 545; *Bartlett v. Ware*, 74 Maine, 293, and *Saco v. Hopkinton*, 29 Maine, 272.

In each of those cases the declaration referred to papers other than those attached to the writ, and items were relied upon not stated in the account. Here, the several items are given, specifying the date, nature and amount of each.

Admitting that every item to which objection has been raised may be the subject of a distinct contract, yet each one is alleged with sufficient particularity to admit proof in support of the same. Every item is a bill of particulars.

The office of a declaration is to make known to the opposite party and the court the claim set up by the plaintiff. To such claims the defendant is called to answer and to no others. But what more specific claim need be alleged than that wherein the plaintiff sets out that on a certain day he performed labor for the defendant, and in the same charge carries out a price which he seeks to recover for that labor? Or, that he paid, on a particular day, a specified sum for freight, for which he also seeks a recovery? For, the legal meaning of the charge may be read along with it, *Cape Elizabeth v. Lombard*, 70 Maine, 399.

The objection that the particular kind of labor performed each day is not specified in addition to the general term "labor" is not tenable. Take an illustration. Suppose instead of one

day's labor the charge had been for any other number — twenty or for fifty. Would it be contended that the various kinds of labor for each day should be specified in order to entitle the plaintiff to recover? Such prolixity in pleading would be neither commendable nor profitable.

This being a question of pleading, all we have to decide is whether the items in the account are sufficient in law. We think they are. *Bassett v. Spofford*, 11 N. H. 167; *Bennett v. Davis*, *supra*; *Cape Elizabeth v. Lombard*, *supra*.

Exceptions overruled. Declaration adjudged good.

PETERS, C. J., WALTON, VIRGIN and LIBBEY, JJ., concurred.

HASKELL, J. Defendant demurs to the insufficiency of a declaration averring his indebtedness according to the account annexed. The cause assigned for demurrer is the insufficiency of three items in the account. One item in it is conceded to be properly stated. For that reason the demurrer should be overruled.

IRVING O. WHITING and another

vs.

HENRY S. BURGER and others, and trustees.

Cumberland. Opinion June 14, 1886.

78	287
59	581
78	287
99	220
78	287
106	493

Judgment in another state. Pleadings. Practice. Exceptions. Evidence.

A judgment of the Supreme Court of the city and county of New York in favor of the plaintiff, is a bar to the further prosecution of an action in Maine between the same parties and for the same cause, although the action was pending in Maine when the other action was commenced in New York.

Such judgment may be pleaded specially as a bar to the further maintenance of the action here, or it may be proved under the general issue.

The court has power in its discretion to allow the general issue to be filed after the filing of a special plea in bar, and no exception lies to the exercise of this discretion.

Where there was a misdescription of some of the items embraced in the former judgment, which misdescription would have been amendable, parole evidence is admissible to prove that such items are identical with those declared on in the pending action.

On exceptions by the plaintiffs.

Assumpsit on an account annexed.

The defendants filed,

1. A plea to the jurisdiction of the court.
2. A plea of a recovery February 4th, 1885, pending this suit, of a judgment by these plaintiffs against these defendants for the same causes of action.

This was Saturday. On Monday, the defendants sought and obtained leave to file the general issue, which was joined the same day. On the next day the plaintiffs moved to strike out the special pleas, and upon hearing, the plea to the jurisdiction was struck out, and the other allowed to stand. The plaintiffs demurred to this plea, specially and generally.

Strout and Holmes, for the plaintiffs, contended that there was error in allowing special plea and general issue, citing: 7 Bac. Abr. 688, Pleadings Q.; *McKeen v. Parker*, 51 Maine, 392; *Jewett v. Jewett*, 58 Maine, 236; *Ludlow v. McCrea*, 1 Wend. 228; *Nicholl v. Mason*, 21 Wend. 334; *Rowell v. Hayden*, 40 Maine, 585.

The ground of defence occurred while this suit was pending. *Stilphen v. Stilphen*, 58 Maine, 517.

This plea having arisen after one continuance and before another, and not having been filed until after the second, should show upon its face that it was properly filed. 1 Chitty's Plead. 660; *Jewett v. Jewett*, *supra*.

Technical pleadings upon one side, which it will be observed were first introduced into this case by the defendants, involves on the part of the other party an observance of rulings in relation to such pleadings, and those rules cannot be disregarded except at the peril of judgment in the case, which shall not in any degree depend upon its merits. Demurrer is the proper pleading in such case, upon which the plea is clearly bad. 1 Chitty's Plead. 523; *Thomas v. Heathorn*, 2 B. & C. 477 (9 E. C. L. 152); *Clarkson v. Lawson*, 6 Bing. 266 (19 E. C. L. 78); *Fitzgerald v. Hart*, 4 Mass. 429; *Augusta v. Moulton*, 75 Maine, 551; *Gillespie v. Thomas*, 15 Wend. 464-467; *Stilwell v. Hasbrouck*, 1 Hill, 561-562; *Tappan v. Prescott*, 9 N. H. 531-534; *State v. Holmes*, 4 Vt. 110.

That the claim for the price of goods sold and delivered can not be the same as claimed for such of the commissions as are set forth in the plaintiffs' writ, would seem too clear to need any argument. No testimony can be imagined which would support equally the two claims. This has been held again and again to be the test as to whether causes of action are identical. 2 Phil. on Ev. (9th ed.) 16; 1 Starkie on Ev. (7th Am. ed.) 262; *Wood v. Jackson*, 8 Wend. 10; *Norton v. Huxley*, 13 Gray, 285; *Eastman v. Cooper*, 15 Pick. 276; *Steam Packet Co. v. Bradley*, 5 Cranch C. C. 393.

Some confusion appears to have arisen out of the practice of putting in parol evidence as to the precise issue decided in the former action, which has gone to judgment, in order to determine whether the point raised in the pending case was decided in the former suit. See *Outram v. Morewood*, 3 East, 346; *Walker v. Chase*, 53 Maine, 258; *Lander v. Arno*, 65 Maine, 26; *Eastman v. Cooper*, 15 Pick. 276; *Butterfield v. Caverly*, 6 Cush. 275; *Sawyer v. Woodbury*, 7 Gray, 499; *Burlen v. Shannon*, 99 Mass. 200; *Littlefield v. Huntress*, 106 Mass. 121; *Wood v. Jackson*, 8 Wend. 10; *Arnold v. Arnold*, 17 Pick. 4, *Packet Co. v. Sickles*, 5 Wall. 580; *Lawrence v. Hunt*, 10 Wend. 80-84.

But in this case there is nothing whatever, and the record shows that there can be nothing, which could show or determine that in any other matter than that set forth in the complaint in that cause, was litigated in the New York suit, for judgment having been obtained by default no other cause of action could have been testified to, or in any way got into the cause. The default is an admission upon the record of the court as to the claim set forth in the complaint and conclusive on the parties. *Morton v. Chandler*, 7 Maine, 44; *Fogg v. Greene*, 16 Maine, 282; *Ellis v. Jameson*, 17 Maine, 235; *Cragin v. Carleton*, 21 Maine, 492; *Thatcher v. Gammon*, 12 Mass. 267.

The defendants can not be permitted to file a plea operating not only as an action of review of the New York judgment, but to alter and reform that judgment if it were in any degree

incorrect, which it is clear can only be done by application to the court which rendered that judgment, which is conclusive while it stands. *Walker v. Chase*, 53 Maine, 258; *Davis v. Davis*, 61 Maine, 395; *Thatcher v. Gammon*, 12 Mass. 267; *B. & W. R. Co. v. Sparhawk*, 1 Allen, 448.

A fact stated which is inconsistent with the record which is made part of the plea, can not be said to be well pleaded. *Arnold v. Arnold*, 17 Pick. 4; *Augusta v. Moulton*, *supra*. And in deciding upon the issue raised by a demurrer, the court looks to no other part of the record. 1 Chitty on Plead. 669.

A plea which admits a cause of action, and affirmatively admits it, as for instance, a tender, can not be joined with one which directly denies it, when both pleas are pleaded to some part of the declaration. Gould Pleadings, c. 3, § § 172, 173; *Alderman v. French*, 1 Pick. 1.

Exceptions were taken to the filing of the general issue, and at the time were well taken, we think, because a special plea had been filed in a matter arising since the commencement of the suit, arising after the continuance, the pleading of which, under the authorities already cited, waived all defence to the merits of the action, if there ever had been any.

The first two items are not included with the others in one cause of action. We could not divide a single sale of merchandise for several suits, but this was a separate contract at a separate time. *Phillips v. Berick*, 16 John. 136.

The error was the exclusion from that suit, a part of our demand sued here, and hence the New York judgment can not be an answer to our whole claim, and we are entitled to judgment for the full amount of it. The plea being bad in part is bad in the whole. *Badger v. Titcomb*, 15 Pick. 409; *Brewster v. Hobart*, 15 Pick. 302-306; *Tappan v. Prescott*, 9 N. H. 531-534.

The case of *North Bank v. Brown*, 50 Maine, 214, has no support in reason or authority, and the premises upon which it is based, are not sound. *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. 244; *Middlesex Bank v. Butman*, 29 Maine, 19.

Nor is the legal effect of the constitutional provision, as stated and implied there, correct. U. S. Const. Art. 4, § 1; Rev. Stat. U. S. § 905; *Hall v. Williams*, 10 Maine, 278; see Story's Conflict of Laws, § 608; *McElmoyle v. Cohen*, 13 Pet. 312; *Thompson v. Whitman*, 18 Wall. 457.

An action may be pending in two different states of the Union, and one will not abate the other. *White v. Whitman*, 1 Curtis, 494; *Bowne v. Joy*, 9 Johns. 221; cited *Wallace v. McConnell*, 13 Pet. 136; *Hatch v. Spofford*, 22 Conn. 484; *McJilton v. Love*, 13 Ill. 486 (54 Am. Dec. 449); *Yelverton v. Conant*, 18 N. H. 123.

So in the state and federal courts in the same district. *Walsh v. Durkin*, 12 Johns. 99; *Mitchell v. Bunch*, 2 Paige, c. 605; *Loring v. Marsh*, 2 Clif. 311.

And a subsequent suit is never ground for abating a prior one. *Webster v. Randall*, 19 Pick. 13; *Davis v. Dunklee*, 9 N. H. 545.

Inasmuch as they can be so prosecuted, judgments may be rendered in each. This doctrine and the converse of that in the case under discussion has been held by Mr. Justice CURTIS, of the Supreme Court of the United States, in the circuit court for this circuit. *Lyman v. Brown*, 2 Curtis, 559.

The cases cited as to the merger do not touch the point decided. *Holbrook v. Foss*, 27 Maine, 441; *Pike v. McDonald*, 32 Maine, 418.

No doctrine of merger can here obtain, for that implies a new security of a higher kind. *Pike v. McDonald*, 32 Maine, 418; 2 Bouvier's Law Dict. 143, Title "Merger"; 2 Rapalje and Lawrence Do. 814, Title "Merger," § 2.

Should the creditor seek to collect more than is due him, *audita querela* is the remedy. *Wood v. Gamble*, 11 Cush. 8-10; *Tarver v. Rankin*, 3 Ga. 210; *Turner v. Whitmore*, 63 Maine, 526.

Every ground, therefore, upon which the case of *North Bank v. Brown* was decided, appears to be fallacious, and the decision should fall. A creditor may pursue his remedy in both jurisdictions until he obtains satisfaction. *Hogg v. Charlton*, 25 Pa. St. 200.

"The effect intended to be given under our constitution to judgments, is that they are conclusive only as regards the merits." *McElmoyle v. Cohen*, 13 Pet. 312; *Bank of Ala. v. Dalton*, 9 How. 522; *Booth v. Clark*, 17 How. 322.

In the absence of this provision, so limited by the federal court, whose special function it is to interpret it, judgments of courts of other states would be treated as strictly foreign judgments. "All agree" to this. *Hall v. Williams*, 6 Pick. 232.

The true rule seems to be that a judgment satisfied may be interposed to defeat a prior action, but not until it is satisfied. We should be pleased to be defeated by a defense based upon payment of a judgment for our cause of action. *Bowne v. Joy*, 9 Johns. 221; *Gilmore v. Carr*, 2 Mass. 171; *Savage v. Stevens*, 128 Mass. 254.

Counsel further cited: 2 Tidd's Practice, (9th ed.) 851; *Jones v. Murphy*, 18 La. Ann. 634.

Mattocks, Coombs and Neal, for the defendants, cited upon the question of pleadings: R. S., c. 82, § 22; Stat. 1831, c. 514; *Potter v. Titcomb*, 13 Maine, 38; *Mayberry v. Brackett*, 72 Maine, 102; *Augusta v. Moulton*, 75 Maine, 557; *Bank v. Blake*, 66 Maine, 285; *Cummings v. Smith*, 50 Maine, 568; Spaulding's Practice, 374, note e; *Rowell v. Hayden*, 40 Maine, 582; *Ludlow v. McCrea*, 1 Wend. 228; *Rogers v. Odell*, 39 N. H. 460.

The court may allow the general issue to be filed after a special plea in its discretion. *Tuffs v. Gibbons*, 19 Wend. 639; *Rowell v. Hayden*, *supra*; *Morgan v. Dyer*, 10 Johns. 161; *Stevens v. Thompson*, 15 N. H. 410; 1 Chitty, Pl. 639; *Rangely v. Webster*, 11 N. H. 299; *Gordan v. Pierce*, 11 Maine, 213.

Former recovery may be shown under general issue. 1 Greenl. Ev. (Redfield's ed.) §§ 531, 531 a; *Gray v. Pingry*, 17 Vt. 419; *Warren v. Comings*, 6 Cush. 104; *Chamberlain v. Carlisle*, 6 Foster, 540; *Perkins v. Walker*, 19 Vt. 144; *Emery v. Fowler*, 39 Maine, 327; see also, *Phillips v. Berick*, 16 Johns. 136; Bigelow, Estoppel, 592, 593; *Potter v. Titcomb*, 16 Maine, 425; *Sturtevant v. Randall*, 53 Maine, 151;

Parol evidence admissible to show grounds of former judgment. *Emery v. Fowler*, *supra*; *Rogers v. Libbey*, 35 Maine, 200; *Perkins v. Walker*, *supra*. Former judgment an effectual bar. *Bank v. Brown*, 50 Maine, 214; 2 Greenl. Ev. 23, and notes; *Emery v. Fowler*, 39 Maine, 332.

LIBBEY, J. This case was tried by the judge presiding below without the intervention of a jury, who rendered judgment for the defendants.

The most important question involved in the case is, whether the former judgment pleaded and put in evidence by the defendants is a bar to the further maintenance of the action. With the fact found by the judge we think it is. The plaintiffs were residents of Massachusetts, and the defendants were residents of New York. This action was commenced September 12, 1884, by attachment of the defendants' property in this state. January 9, 1885, the plaintiffs commenced another action against the defendants for the same causes of action, in the Supreme Court for the city and county of New York, in which the defendants, having been duly summoned, appeared, and judgment was rendered by said court on default, February 4, 1885, for the amount claimed in the complaint.

It is claimed by the learned counsel for the plaintiffs that the judgment in New York has no effect here except to preclude the defendants from the right to controvert the validity of the claims in suit—that it can not be set up by the defendants as a bar to the maintenance of this action. The court in New York had jurisdiction of the parties and of the subject. The judgment there is a bar to another suit in the courts of that state for the same causes of action. Upon this point the law of that state is the same as in this state. A judgment in assumpsit merges the promise declared on, and no further action can be maintained on it. *Peters v. Sanford*, 1 Den. 224; *Nicholl v. Mason*, 21 Wend. 339.

We think the rule well settled that a judgment which is conclusive between the parties, and a bar to another action for the same cause in the state where rendered, is, by the constitution of the United States, Art. 4, § 1, and the act of Congress of

May 26, 1790, equally conclusive in every other state in the Union. This is the declared doctrine of this court. *North Bank v. Brown*, 50 Maine, 214; *Sweet v. Brackley*, 53 Maine, 346. The same doctrine is held by the Supreme Court of the United States. *Insurance Co. v. Harris*, 97 U. S. 331. That case appears to be directly in point. It was an action commenced in the circuit court of the United States for the District of Maryland, on two life policies. While it was pending in that court, a judgment was rendered in the Supreme Court for the city and county of New York against the defendant company, upon the same policies, in an action in which the plaintiff and defendant were parties, and the question involved was whether the New York judgment was a bar to the further maintenance of the action in the federal court. In the opinion the court say: "The decree made by the Supreme Court of New York, if admissible, was certainly material. It will not be denied that its effect was the creation of a complete bar against the recovery of any other judgment, in that state, on these policies of insurance, against the plaintiffs in error. The claim of Brune or Whitridge became merged in the judgment of that court. It is perfectly immaterial whether the New York court first obtained jurisdiction of the subject and the parties, as in fact it did. When the final judgment was rendered it closed the controversy, and after that the person assured by the policies could not have maintained a suit on them, in that state, in the same or any other court; and if not, he can not now in any other state of the Union. This is settled by the act of Congress of May 26, 1790, which declares that the records and judicial proceedings of the courts of any state, when authenticated, shall have such faith and credit given them in every court within the United States, as they have by law or usage in the courts of the state from whence they are taken. The meaning of this is, that when a judgment or decree has been given in one state by a court having jurisdiction of the parties and the subject, it has the same force and effect when pleaded or offered in evidence in the courts of any other state." Citing *Mills v. Duryee*, 7 Cranch, 481; *Mayhew v. Thatcher*, 6 Wheat. 129; *Habich v. Folger*, 20

Wall, 1; *Bumby v. Stephenson*, 24 Ohio, 474; and *Dobson v. Pearce*, 12 N. Y. 156.

This is a federal question, and if we could have any doubt about it, we are bound to follow the law as decided by the federal court of last resort.

But it is claimed that the former judgment was not properly before the court because not properly pleaded. The defendants first pleaded it in bar of the further maintenance of this action; and afterwards, by special leave of court, pleaded with it the general issue. Plaintiffs demurred specially to the plea in bar, and joined the general issue. It is claimed by the counsel for the plaintiffs that the special plea should be held bad on the demurrer, because it does not contain the technical requirements of a plea *puis darrein continuance*. The answer is, it is not such a plea. It is a special plea filed before issue joined, and one that may be filed at any time before issue joined without special leave of court. *Rowell v. Hayden*, 40 Maine, 582. It is urged further that the plea is bad because it appears by the authenticated copy of the judgment, which is referred to in the plea and filed with it, that the first two items of the claims declared on in the two actions are not the same. The plea avers that they are identical and the same, and the plea is not bad on this ground unless they are necessarily different. We think they are not.

But the sufficiency of the special plea is not material to the result. We think it well settled that the former judgment, duly authenticated, was admissible in evidence under the general issue, and would have the effect, with the fact found by the judge, to bar the further maintenance of the action. *Insurance Co. v. Harris*, *supra*, p. 336, and cases there cited; *Emery v. Fowler*, 39 Maine, 326.

It is claimed, however, that the court had no power to allow the general issue to be filed, after the filing of the special plea, and before issue was tendered upon it. We have no doubt that the court had such power, to be exercised in its discretion, and exception does not lie to the exercise of such discretion.

The remaining question is whether the court erred in admitting

evidence to prove the identity of the first two items of the claims declared on in the two actions. This action is an account annexed, and the first two items are described as follows :

"1884, June 30. Comms. on their sales in Boston, June, '84, \$103.14."

"July 31. " " " " July, '84, \$56.33."

In the complaint on which the New York judgment was rendered as "goods and merchandise," sold and delivered to the defendants, "\$103.14, June 30th, 1884," "\$56.33, on July 31st, 1884."

When the record does not disclose the precise issues raised and claims considered and which pass into judgment in the action, they may be shown by parol evidence. *Rogers v. Libbey*, 35 Maine, 200; *Emery v. Fowler*, 39 Maine, 326; *Campbell v. Rankin*, 99 U. S. 261; *Cromwell v. County of Sac*, 94 U. S. 351.

But it is claimed an item for goods and merchandise sold can not be the same as an item for commissions on sales of merchandise. May not the claims *in substance* be the same, but in the one case or the other, through mistake or clerical error, be misdescribed? The dates are the same and the amounts are the same. If the claims were in fact the same, which is not controverted, the misdescription was amendable, and where a claim in suit is in part misdescribed, and goes into judgment without objection, we think parol evidence to explain and identify it, is not a contradiction of the record, but is within the rule as held in the authorities cited. The court below found that the items in the two actions were identical. This finding of fact is conclusive. We think the bar perfect.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.

ABIGAIL ALVORD *vs.* EDWIN STONE, administrator.

York. Opinion June 14, 1886.

Probate appeal. Costs.

In an appeal from a decree of the probate court, allowing a will, to the Supreme Court of Probate, the whole subject of the allowance of costs is in the discretion of the court. In such case with a final decree in the Supreme Court of Probate sustaining the will without allowing costs, no costs can be

recovered. Such a decree, silent as to costs, bars the recovery of costs as effectually as an affirmative decree disallowing them.

ON REPORT.

The case is stated in the opinion.

Augustus F. Moulton, for the plaintiff.

The plaintiff was named executrix in the will. It was her duty to present it for probate. She would have been liable to punishment had she not done so. *Carvill v. Carvill*, 73 Maine, 136; R. S., c. 126, § 3.

"In cases of appeal from the decree of probate of a will and granting letters testamentary and a final decree against the will, the executors will be allowed the expenses of the litigation *bona fide* incurred in attempting to support the will." 3 Redfield on Wills, *123, and cases cited; *Butler v. Jennings*, 8 Rich. Eq. (S. C.) 87; U. S. Dig. vol. 19, p. 706; *Young, Ex parte*, 8 Gill, (Md.) 285; U. S. Dig. vol. 13, p. 347; *Mesick v. Mesick*, 7 Barb. (N. Y. S. C.) 120.

"In New Jersey an executor propounding a will acting in good faith, is entitled to costs out of the estate, whether probate be granted or refused." *Perrine v. Applegate*, 1 McCarter, 531; *Boylan v. Meeker*, 15 N. J. Eq. 310; Redf. Am. Cas. on Wills, 487; see cases cited in Redfield on Wills, 118.

An executor performing his duty in good faith will be reimbursed for all proper expenditures in supporting a will. Redfield gives this as settled law as cited above.

Williams on Executors, *310, gives the same without qualification. "A legatee performing the duty of an executor in proving the will, is entitled to his costs out of the estate." This is our case precisely.

In *Crofton, Ex. v. Illsley*, 6 Maine, 48, a case somewhat like this, where the court in its decree concerning the will had said nothing about costs, (4 Maine, 134,) the court acted upon the argument of counsel that "the costs having been prudently incurred, were a proper charge against the estate."

The Supreme Court might, under authority of R. S., c. 63, § 30, have settled the question of costs and expenses in its decree

touching will and codicil, but the question was not then raised and the court did not interfere with it. The statute leaves it discretionary with the court whether to interfere in this regard or not. They "may" allow costs, etc.

It is objected that letters were not actually issued to this executrix. They could not during the time when this bill accrued; the claim is under the will, not under letters. The probate is merely operative as the authenticated evidence, and not as the foundation of the executor's title, for he derives his interest from the will itself." Williams on Executors, * 239; 3 Redfield on Wills, * 70.

This debt having accrued since the death of the testator, the plaintiff may sue either in her personal or representative capacity at her option. Williams on Executions, * 1590; 3 Redfield on Wills, * 196.

R. P. Tapley, for the defendant, cited: *Kingman v. Soule*, 132 Mass. 288; *Davis v. French*, 20 Maine, 21; R. S., c. 64, §§ 3, 32, 33; c. 63, § 30; *Baker v. Moor*, 63 Maine, 446; *Stone v. Locke*, 48 Maine, 425; *McKenney v. Alvord*, 73 Maine, 226.

LIBBEY, J. The plaintiff was named as executrix in certain instruments purporting to be the last will and testament and a codicil thereto, of Aaron McKenney, deceased. She presented the will and codicil to the probate court for probate and allowance. The validity of the will and codicil was contested, but they were allowed by the judge of probate. An appeal was taken to the Supreme Court of Probate, and the case was tried to a jury on two issues: 1, whether the testator was of sound mind when he executed them; 2, whether they were procured by the undue influence of the plaintiff. The verdict sustained the will, but was against the codicil on both grounds. A final decree was entered allowing the will, but rejecting the codicil; and the decree was certified to the probate court. The decree was silent as to costs.

This action is brought by the plaintiff against the defendant

as administrator on the estate of said McKenney, to recover her costs, expenses and disbursements in the prosecution of that suit. We think it can not be maintained.

What power the appellate court had over the matter of costs is to be exercised in its discretion, and its exercise must depend upon the facts and circumstances of the case. "In all contested cases in the original or appellate court of probate, cost may be allowed to either party, to be paid by the other, or to either or both parties, to be paid out of the estate in controversy, as justice requires." R. S., c. 63, § 30.

Neither party has a legal right to costs. The whole subject of costs rests in the discretion of the courts. The power of the court is precisely the same as in equity. The decree of the appellate court was final, and ended the litigation testing the validity of the will and codicil. The suit was no longer before the court. When the allowance of costs is in the discretion of the court and a final decree or judgment is entered without including costs, no costs can be recovered. Costs are the mere incident of the judgment, and if not included in it, are lost. *Stone v. Locke*, 48 Maine, 425, and cases cited. In such case, a final decree, silent as to costs, is as conclusive a bar to a recovery of them as if it affirmatively disallowed them. This court no longer has any jurisdiction over the subject.

But if it had, it is clear that, under the statute, it is a discretionary power; and it is difficult to perceive how an action at law, a recovery in which is a matter of legal right, can be maintained. The parties had a right to trial by jury. Is the discretion of the court to be exercised by the jury? The case appears too clear for further discussion. The same question is carefully considered and determined in *Lucas v. Morse*, 139 Mass. 59.

Judgment for defendant.

PETERS, C. J., WALTON, VIRGIN and FOSTER, JJ., concurred.

78	800
86	257
78	300
88	68

JAMES MURCHIE and others vs. EPHRAIM C. GATES.

Washington. Opinion June 15, 1886.

Waters. Prescription. Charge of judge. Practice.

A right to the artificial flow of water through a water course, can be acquired by prescription.

It is not an expression of opinion for the presiding justice to review the evidence, or to state isolated items of evidence.

ON EXCEPTIONS and motion to set aside the verdict.

Case for diverting the water from the plaintiffs' water mills in Calais.

The opinion states the facts.

In his charge the presiding justice instructed the jury, among other instructions as stated below, and to so much as is printed in italics the defendant alleged exceptions to as expressing an opinion to the jury :

"The plaintiffs must satisfy you of the extent of their damage, by reason of the diversion of the water ; but you must determine upon the whole evidence, what damage they sustained by the wrongful diversion of the water. *William A. Murchie, one of the plaintiffs, testified in regard to the damage. He gave you as best he could, I suppose, the facts entering into this question. He stated to you the fair rental value of the mill per thousand for manufacturing long lumber. I do not know but he stated the fair value of the use of the mill for manufacturing short lumber, the shingles and lathes ; if he did it has escaped me. And you will remember, he made his estimate of the quantity which each gang would cut less, by reason of the want of water, than it would have done if they had had their usual flow of water, without any diversion ; five thousand a day, I think, to each gang ; and then the diminished quantity of short lumber. Then there is another element that enters into the consideration of the question of damage ; and that is the expense of the crew and everything that enters into the running of the mills which is to be applied to the diminished quantity manufactured, rather than*

to the full quantity that might have been manufactured if the plaintiffs had had the water which they were entitled to.

"Mr. Murchie told you the difference in the expense per thousand, according to his estimate, between the one basis and the other. Now so far as his testimony is matter of opinion, it is merely opinion of the witness based upon the facts which he has stated to you. It is competent evidence to submit to the jury, and still a jury is not required to go by it, because in all cases involving matters of this kind where witnesses are called on the one side and the other to give an opinion, we are accustomed to find a great difference in the opinion of men of equal intelligence and equal opportunities for observation,—equal knowledge, and equal integrity.

"The opinion may be some aid, but when you have the facts upon which it is based, it is competent for you to form your own opinion upon the facts, disregarding the opinion of the witnesses. It is all a matter addressed to your good common sense and sound judgment, and if you find for the plaintiff, you must determine what they are fairly and justly entitled to receive as their damages."

A. McNichol, and *George A. Curran*, for plaintiffs, cited, as cases in which this same water power was involved: *Munroe v. Gates*, 42 Maine, 178, and 48 Maine, 463; *Stickney v. Munroe*, 44 Maine, 199; *Munroe v. Stickney*, 48 Maine, 458. On Water Easements: Wash. Easements, 368 and cases cited; *Delaney v. Boston*, 2 Harr. 489; 44 Maine, 155; 63 Maine, 434; 44 Maine, 167; 28 Maine, 554; Wash. Easements, §§ 17, 20, and cases cited; Angell, Watercourses, 400–404.

F. A. Pike, for defendant.

The mill privilege on which defendant's mills stand is an artificial privilege. Artificial water courses are those where either the sources or supply or the channels through which the water flows is provided by other than natural causes, and the question, how far and what rights are acquired in these by the owners of the land through which they flow, is a question of considerable and growing importance. Woods' Law of Nuisance,

§ 399. In *Brown v. Chadbourne*, 31 Maine, 9, there was no question that Little River privilege of Brown was a "natural privilege." Neither Chadbourne nor anybody else had created it. It is equally clear in this case that without the expenditures of the defendant's grantors there could have been no "privilege" upon which to put the Murchie mills.

The general history of lumber water privilege in this state shows that proprietors with good reason consider them temporary where they are dependent upon dams. Take this dam, for instance, rudely built of logs for framework. It lasts but a comparatively short time.

In *Arkwright v. Gell*, 5 Mees. & W. 203, the plaintiff and his grantors had occupied an artificial stream eighty years and had erected extensive cotton mills on it. In *Gould v. Martyn*, 13 L. T. (N. S.) 74, the occupancy was very long and the court say the plaintiff acquired no right to the use of this stream by occupancy of twenty years. "The user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from where the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbor below. The law relating to natural streams is entirely different."

The statute of this state providing that occupancy must be "adverse" as well as open, exclusive, and long continued, is in accordance with the decision. Surely there is no pretence in this case that the use of the water in the Murchie mills is "adverse" to Mr. Gates' rights. I need say nothing as to prescription after the recent opinion of the court in the Waterville cotton mill case, *Lockwood Co. v. Lawrence*, 77 Maine, 297.

EMERY, J. There was evidence tending to establish the following as facts: In the St. Croix river, at Calais, is an island near the American shore. This island and the American shore for some distance above and below were formerly one estate. As early as 1810, dams and mills were built across from the shore to the island at the upper end. The title to this upper mill privilege afterwards came to the defendant. In 1824 was

the severance in the ownership. A conveyance was made of the land nearly opposite the lower end of the island, "with liberty to build a dam from the shore across to the island." The title to this lower privilege afterwards came to the plaintiffs.

The owners of the upper privilege had, from time to time during the last forty years, deepened the channel leading to their mills by removing rocks, etc. They had also for at least sixty years maintained a sheer dam running from the upper end of the island up the river and sheering out into the river. This sheer dam and the deepening of the channel conducted more or less of the waters of the St. Croix toward the American shore and down inside the island, which water would otherwise have flowed past outside of the island. For many years, at least forty, there were several mills on the upper privilege, between the shore and the island, which vented the water into the channel between the island and the shore. This flow of water down inside the island was the power for the mills upon the lower privilege. At the upper end of the island upon the upper privilege was also a mill called the Franklin mill which vented water into the main river outside the island. This water, of course, would not then flow to the lower mills.

In 1882, the defendant ceased using the inshore mills for a time, and diverted to the Franklin mill, and so down outside the island, the water that formerly flowed through the inshore mills, down inside the island to the plaintiffs' mills. For this diversion this action was brought and the jury have found there was such a diversion of the water.

The defendant contended that the plaintiffs could only claim of right the natural flow of the water, and could not acquire by user, however long continued, a legal right to the surplus or extra water artificially led into the channel by the defendant's sheer dam, and by his artificial deepenings of the channel. The judge in effect instructed the jury that the plaintiffs were entitled to all the water which naturally flowed in the channel between the island and the American shore, and which had been permitted to flow and they had been accustomed to receive at their mills and privilege, through the series of years down to 1882. That series

of years was admittedly more than twenty. The defendant construes this language as meaning that the plaintiffs might be entitled to more than the natural flow of water—that they might become entitled by prescription to the flow of such water as had been artificially led into the channel. We think it may be construed to mean that the plaintiffs were entitled to only so much of the natural flow as had been permitted to flow, lessening rather than enlarging their rights. The defendant contended for a prescriptive right to divert the water from the plaintiffs, and if applied to that contention, the instruction was in their favor. But we will examine the instruction as construed by the defendant.

If the plaintiffs, by a user sufficiently long and continuous, could acquire a prescriptive right to the accustomed flow of the water thus artificially led into this channel, the instruction is admittedly correct, but the defendant contends that the water course inside the island was in fact artificial, and that no prescriptive rights can be acquired therein.

The theory of prescriptive rights is, that there was a grant made of them. It is presumed that what one has so long permitted another to enjoy, he has granted to him. It would seem that a grant of water easements could be as readily presumed as a grant of any other easements. Such easements are valuable. Important interests often depend on them. They are the ordinary subjects of grants. The uses of them are as permanent as in the case of many other easements. They can be as easily defined. There would seem to be no good reason for excepting them from the general rule as to prescriptive rights. If prescription is to obtain at all as a foundation of legal rights, such a case as this would seem to be clearly within the principle.

We also think the case is within the authorities. In *Belknap v. Trimble*, 3 Paige, 577, Chancellor WALWORTH appositely said, "A proprietor at the head of a stream who has changed the natural flow of the waters, and has continued such change for more than twenty years, can not afterward be permitted to restore it to its natural state, where it will have the effect to destroy the mills of other proprietors below, which have been

erected with reference to such change in the natural flow of the stream." In *Delaney v. Boston*, 2 Harr. (Del.) 489, it was declared that one who has suffered water to flow through his land in a new artificial channel for twenty years, can not then divert it to the injury of riparian proprietors above, who have enjoyed the benefit of its flowing in such artificial channel. In *Shepardson v. Perkins*, 58 N. H. 354, the case last cited is quoted, and the principle applied in favor of mill owners below on the artificial channel. See also the English cases, *Wood v. Waud*, 3 Ex. 777; *Magor v. Chadwick*, 11 A. & E. 571.

The defendant urges that he can not be obliged to keep up the sheer dam, and that all the extra flow is caused by his works. He insists he is not bound to maintain works to lead water to the plaintiffs' mills, and that what extra water he gathers in by his own labor and appliances, he can use and set free in what direction is most convenient for him. This action, however, is not for neglect to keep up the dam, nor for refusing to gather water into the channel. The water, the diversion of which is complained of, had in fact come into the channel down as far as the upper mills. From that point such water had for more than twenty years flowed inside the island, and turned the plaintiffs' mills. It will be recalled that the owners of the upper mills conveyed the land below for a mill privilege; that the purchasers built mills thereon which have been propelled by water from the upper mills for half a century.

The English cases cited by the defendant will be found upon examination to be cases of artificial supply rather than of artificial channel. In other English cases the distinction is clearly made, and the same principles applied to artificial, as to natural water courses. See language of POLLOCK, C. B., in *Wood v. Waud*, *supra*, and LENMAN, C. J., in *Magor v. Chadwick*, *supra*. Baron CHANNELL, in *Nuttall v. Bracewell*, L. R. 2 Ex. 1, tersely expresses the situation here when he says, "It is a natural flow or stream through an artificial channel." See also *Ivimey v. Stocker*, 1 L. R. Ch. 396. The case *Lockwood Co. v. Lawrence et als.* 77 Maine, 297, cited by defendant, recognizes

the doctrine that rights in the flow of water may be acquired by prescription. The rights contended for in that case, however, were not sustained by the evidence. In this case the evidence was for the jury.

The other exceptions to the judge's charge are not to his statement of the law, but rather to his statement of the positions of the parties—to his statements of the evidence, and to his comments upon various items of evidence. Complaint is made that he called the attention of the jury to certain testimony, and made no mention of other testimony upon the same point. It is urged that if he did not formally express an opinion, he by this course indicated an opinion upon facts in issue, contrary to R. S., c. 82, § 83.

If the legislature has the constitutional power to thus restrict the judiciary, a co-ordinate department under the same constitution with itself, it has not undertaken to forbid the presiding justice explaining the issues to the jury, or calling their attention to such of the testimony as he thinks will aid them. In many cases after a long trial with several issues, the judge must necessarily review more or less of the testimony, if there is to be any hope of an intelligent decision. In the performance of this important and delicate duty, he must have a large discretion which it would be impracticable for the law court to control. If either party thinks any material matter has been misstated, or over-stated, or omitted, he should ask for proper corrections before the jury are finally sent out. He ought not to be silent then, when corrections can be made, and complain afterward, when corrections can not be made. Rule of Court, No. 18; *State v. Benner*, 64 Maine, 267; *Bradstreet v. Rich*, 74 Maine, 308.

In this case there was no waiver of the rule, and no error was suggested to the judge until after the verdict.

The exceptions to the admission and exclusion of testimony are not pressed in the argument. We have carefully considered them and do not see that the defendants were prejudiced by the rulings.

Upon the motion for a new trial, we find evidence which, if

believed, warranted the verdict for the plaintiffs and also the amount of the damages assessed. The able argument for defendant might have led us to fix a smaller amount, but we can not say the amount fixed by the jury is clearly too large.

Motion and exceptions overruled.

Judgment on the verdict.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

HENRY P. CANNON vs. FRANCIS A. SEVENO and others.

78	307
105	297

Somerset. Opinion June 17, 1886.

Poor debtor's disclosure. Record. Law and fact. Practice. R. S., c. 113, §§ 37, 69.

The judgment of two justices of the peace and quorum, who hear a debtor's disclosure, having jurisdiction, can not be contradicted, as between the parties, upon any point judicially determined by them, except as by R. S., c. 113, § 69.

When the justices adjudicate, as appears by their record, that it does not appear from the debtor's disclosure that he had in his possession any account against any one, the record is conclusive and can not be contradicted by the debtor's disclosure, signed and sworn to by him.

If such question is open, whether it so appears or not, by such disclosure, it is a question of law for the court, and not for the jury.

Where the creditor is present by his attorney, and the debtor discloses an attachable interest in real estate, the justices are not required to give the creditor a certificate thereof, as provided in R. S., c. 113, § 37, unless requested so to do by the creditor or his attorney, and a failure to do so does not affect the debtor's discharge.

ON EXCEPTIONS.

Debt on poor debtor's bond given by Seveno as principal and the other defendants as sureties. The plea was *non est factum* and a brief statement that Seveno had performed one of the conditions of the bond, by citing the creditor and disclosing and taking the proper oath, and receiving a certificate from the justices administering the oath. The jury returned a verdict for the plaintiff for two hundred and sixty-seven dollars, and the defendants alleged exceptions which are sufficiently indicated in the opinion.

E. N. Merrill, for the plaintiff.

The record of the justices shows that the account against M. D. Ward was neither appraised and set off by the justices, nor assigned by the debtor to the creditor. The record of the justices also shows that neither the agreement from White to Seveno or the bond to convey real estate, were appraised and set off by justices or assigned by the debtor to the creditor as the statute requires; they were not duly secured before the justices issued their certificate, and not securing the property they had no authority to issue it, and being void for want of authority, it can not be set up in defense. *Hackett v. Lane*, 61 Maine, 36; *Leighton v. Pearson*, 49 Maine, 102; *Call v. Barker*, 27 Maine, 105; *Robinson v. Barker*, 28 Maine, 314; *Jewett v. Rines*, 39 Maine, 12.

Real estate liable to be seized on execution was disclosed, as shown by the record of the justices. In such case the statute states that the justices shall give a certificate, and also states what that certificate shall contain, the names of the parties and the amount of the execution, etc. This was not done. For these causes alone there was a breach of the bond. *Leighton v. Pearson*, 49 Maine, 102.

The justices as well as the debtor must follow implicitly the statute provisions. *Hackett v. Lane*, 61 Maine, 36; *Leighton v. Pearson*, 49 Maine, 100.

The measure of damages is not restricted necessarily to the value of the Ward account, the bonds and contract from White to Seveno, or to the value of Seveno's interest in the real estate, but must be assessed on proof of the ability of the debtor to pay. *Torrey v. Berry*, 36 Maine, 592; *Call v. Barker*, 28 Maine, 325.

The court not having been organized within the hour appointed and fixed by the citation, the justices had no jurisdiction, and having no jurisdiction, their record is not conclusive. *Belcher v. Treat*, 61 Maine, 580; *Foss v. Edwards*, 47 Maine, 150; *Stanton v. Hatch*, 52 Maine, 246; *Spencer v. Perry*, 17 Maine, 415; *Dodge v. Kellock*, 13 Maine, 136; *Hill v. Jones*, 122 Mass. 412; *Banks v. Johnson*, 12 N. H. 445.

Nothing is to be presumed in favor of the jurisdiction of justices of the peace. *State v. Hartwell*, 35 Maine, 129; *Hersom's case*, 39 Maine, 476; *Lane v. Crosby*, 42 Maine, 327; *Wat. I. M'fg Co. v. Goodwin*, 43 Maine, 431; *Dodge v. Kellock*, 13 Maine, 136; *Granite Bank v. Treat*, 18 Maine, 340.

D. D. Stewart, for the defendants.

No account was disclosed for appraisal. *Robinson v. Barker*, 28 Maine, 313.

The adjudication of the justices was conclusive. *Agry v. Betts*, 3 Fairf. 417; *Pike v. Herriman*, 39 Maine, 53; *Hanson v. Dyer*, 17 Maine, 98; *Paul v. Hussey*, 35 Maine, 97; *Baldwin v. Merrill*, 44 Maine, 55; *Foss v. Edwards*, 47 Maine, 149; *Lewis v. Brewer*, 51 Maine, 108; *Folsom v. Cressey*, 73 Maine, 272.

If there were errors in the record of the justices, certiorari is the remedy. *Dow v. True*, 19 Maine, 46; *Metcalf v. Hilton*, 26 Maine, 200; *Little v. Cochran*, 24 Maine, 509; *Ross v. Ellsworth*, 49 Maine, 418; *Lewis v. Brewer*, 51 Maine, 108; *Marr v. Clark*, 56 Maine, 542; *Hayward, Pet.* 10 Pick. 358; *Locke v. Lexington*, 122 Mass. 290; *Betts v. Bagley*, 12 Pick. 583; *Van Wormer v. Albany*, 15 Wend. 264; *Onondaga v. Briggs*, 2 Denio, 33.

Upon the question of the real estate disclosed and the effect of it, counsel cited: *Freeman v. Thayer*, 33 Maine, 76; *Haskell v. Hilton*, 30 Maine, 420; *Dockray v. Mason*, 48 Maine, 178; *Des Brisay v. Hogan*, 53 Maine, 554; *Webster v. Folsom*, 58 Maine, 232; *Hamilton v. Cone*, 99 Mass. 478; *Clement v. Wyman*, 31 Maine, 50; *Keene v. Parker*, Franklin Co. 1883, not reported.

LIBBEY, J. The first question that arises by the exceptions is whether the record of the justices of the peace and quorum, who heard the debtor's disclosure, can be contradicted by the introduction of the debtor's disclosure.

We think it well settled that the judgment of the justices of the peace and quorum, who hear a debtor's disclosure, having jurisdiction, can not be contradicted as between the parties, upon

any point judicially determined by them. They are a special tribunal with judicial powers, and their judgment within their jurisdiction, is as conclusive as that of other courts. *Emery v. Brann*, 67 Maine, 39; *Agry v. Betts*, 12 Maine, 417; *Pike v. Herriman*, 39 Maine, 53; *Hanscom v. Dyer*, 17 Maine, 98; *Lewis v. Brewer*, 51 Maine, 108. To this rule there is, by R. S., c. 113, § 69, an exception as to their determination of the legal service of the citation upon the creditor. But before this statute their determination on that point was conclusive, although erroneous.

By R. S., c. 113, § 31, "When from such disclosure, it appears that the debtor possesses or has under his control bank bills, notes, accounts, bonds, or other contracts, or other property not exempt by statute from attachment, which can not be come at to be attached, . . . the justices hearing the disclosure shall appraise and set off enough of such property to satisfy the debt, costs and charges." Whether it does or not appear from the disclosure that there is any such property disclosed by the debtor, may embrace matters of law and fact, and such matters are within the jurisdiction of the justices, and they must necessarily determine them. It is absurd to say that the justices must appraise an alleged account when they determine that no such account is disclosed by the debtor. It is a matter which they must determine judicially, and their determination is binding till set aside by proper process.

The judgment of the justices was put in evidence by the defendants. After reciting the disclosure of one account against one Weeks, and its appraisal by them, it contains the following adjudication: "And it not appearing in or by said disclosure, or by any evidence offered by either party, that said debtor had in his possession or under his control, any bank bills, notes or other accounts, or bonds, or contracts, or property not exempt by statute from attachment, but which can not be come at to be attached," and this is followed by the adjudication that the debtor is entitled to have the oath administered. Here is an adjudication that it did not appear from the disclosure that the debtor had any account except the one stated and appraised.

We think this is conclusive in this action, and that the court erred in admitting the disclosure as evidence to prove that it did appear that an account was disclosed against one Ward.

But if the disclosure was properly admitted in evidence to contradict and control the record in that respect, it was a document in writing, signed by the debtor, and should have been construed by the court. It raised no question for the jury, and upon a careful examination of it, we are satisfied that the adjudication of the justices was correct; that it does not appear from it that the debtor disclosed an account or claim against Ward, within the meaning of the statute. When it appears from the disclosure that the debtor has mutual accounts with another, and that the amount against him is much larger than that in his favor, it is not a disclosure of an account within the meaning of the statute to be appraised by the justices. *Robinson v. Barker*, 28 Maine, 313.

By the disclosure, it appears that Ward and twenty-one others associated with him, owned the house and lot occupied by the debtor, and that the debtor was occupying under them for a rent agreed upon; that Ward in the management of the property and in the receipt of the rent, acted for himself and as agent or trustee for the other owners; that by an agreement with Ward the debtor built a fence on the lot and procured a water pipe at an expense of twenty-seven dollars, for which Ward agreed to pay; and it further appeared that, at the time of the disclosure, there was more than twenty-seven dollars due from the debtor for rent.

The fence and pipe, being improvements upon the estate made under a promise of Ward acting for himself and his associates, created a liability on the part of the owners therefor, and the rent due might be off-set against it. There was then nothing to be appraised and set off to the creditor.

It remains to examine the other ground relied on by the plaintiff to invalidate the debtor's discharge. It is claimed that the debtor disclosed an interest in real estate, liable to seizure on execution, and that the justices should have made and delivered to the creditor a certificate thereof, as required by

R. S., c. 113, § 37. This statute requires nothing to be done by the debtor. It is for the benefit of the creditor if he desires to avail himself of it. It imposes a duty upon the justices toward the creditor, which he may or may not desire them to perform. We are of opinion that they are not required to make and deliver to the creditor such certificate if not requested to do so. The creditor's attorney was present and it does not appear that he requested it. It has been twice held by this court that no such duty rests upon them if the creditor or his attorney is not present and does not afterwards request it. *Clement v. Wyman*, 31 Maine, 50; *Keene v. Parker*, decided by this court by rescript in 1883. Much less is it their duty to do so if the creditor or his attorney is present and does not request it. The ruling of the court on this point was erroneous.

Exceptions sustained.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.

FRANK M. ROSS vs. CHARLES M. TOZIER.

Kennebec. Opinion June 5, 1886.

Insolvent law. Judgments.

78	312
86	113
78	312
80	545

A debt due upon a contract existing at the time of the passage of the insolvent law is not barred by a discharge under that law, notwithstanding that it passed into a judgment after the enactment of that law.

Debt on judgment; the defense relied upon was a discharge under the insolvent law. The judgment, rendered after the passage of the insolvent law, was upon a contract liability incurred prior to the enactment of that law.

Webb and Webb, for the plaintiff.

Brown and Carver, for the defendant.

PER CURIAM. It is the opinion of a majority of the justices of this court that a debt due upon a contract existing at the time of the passage of the insolvent law of this state, is not barred by a discharge under the law, notwithstanding a judgment has

been obtained upon the debt in a suit commenced subsequent to the passage of the law; that to hold otherwise would conflict with the federal constitution in this, that it would impair the obligation of a contract. True, there are decisions to the contrary; but it is the opinion of a majority of the court that principle and the weight of authority are in accord with the conclusion here announced.

NOTE. The same question was involved in a case from Somerset county.

PHILANDER WILSON *vs.* SAMUEL BUNKER.

A. H. Ware, for the plaintiff.

D. D. Stewart, for the defendant.

PER CURIAM. A debt contracted before, upon which a judgment was obtained after, the passage of the insolvent law, is not discharged by a release of the debtor under that law. If for no other reason, such an effect would be a violation of that clause in the federal constitution which prohibits the several states from passing laws violating the obligation of contracts as interpreted by the federal courts. See *Ross v. Tozier*, lately decided in Kennebec county.

JOHN L. DAVIS *vs.* TIMOTHY CALLAHAN.

78	313
98	503

Androscoggin. Opinion June 22, 1886.

Will. Devise. Life-estate. Residuary devisee. Deed. Name of grantor.

When a party is the devisee of the interest in real estate specifically devised as a life-estate, that fact will not preclude such party from taking the remaining interest in the estate in the character of a residuary devisee.

By one clause of a will the testator devised unto his wife, for and during the term of her natural life, certain real estate. The reversionary interest therein was not specifically devised. By the general residuary clause he devised unto his wife all the rest, residue and remainder of his estate, real, personal and mixed, wherever found and however situate. *Held*, that by the terms of the will and the intention of the testator as gathered from the whole instrument, the wife took an estate in fee in the real estate thus devised.

Where a party has in fact signed and executed a deed by a name which he has seen fit to adopt, although not the correct name of such party, he will nevertheless be estopped from taking advantage of it.

Such act will be binding not only on such party, but on all others in privity with him, and whose rights are not paramount thereto.

ON REPORT.

Real action for the possession of a certain house and lot on Lincoln street, Lewiston. By the terms of the report the law court were authorized to draw such inferences of fact as a jury might, and render such judgment as the legal rights of the parties required.

The following is a copy of the will of Daniel Callahan referred to in the opinion :

"I, Daniel Coughalane, of Lewiston, in the county of Androscoggin and state of Maine, being weak in body, but of a sound and perfect mind and memory, do make, publish and declare this my last will and testament, and herein dispose of all my worldly estate, in manner following, to wit :

"First. I order and direct my executor herein named to pay all my just debts and funeral charges as soon as may be after my decease.

"Second. I give and bequeath to my wife, Honnora Coughalane, all my household furniture, all the provisions I may have on hand at the time of my decease ; fourteen hundred dollars now deposited or in one of the Boston savings banks, and all interest thereon accrued or that may have accrued at the time of my decease.

"Third. I give and devise to my said wife for and during the term of her natural life, the lot and house and all buildings on the lot on Lincoln street in Lewiston, meaning the lot and house by me occupied at the date of this instrument, and next east of the old Catholic church on said street, to have and to hold the same to her and her assigns, with all of the appurtenances thereto belonging, for and during the term aforesaid.

"Fourth. I give, devise and bequeath to my said wife all the rest, residue and remainder of my estate, real and personal and mixed, wherever found and however situate, and I do hereby appoint John McGillicuddy, of Lewiston, sole executor of this my last will and testament, hereby revoking all former wills by me made, meaning to revoke the will by me signed and bearing date August the 21st, A. D. 1867." Duly signed and executed.

Savage and Oakes, and *P. S. Laughton*, for the plaintiff, cited : 2 Redf. Wills, 116 ; 5 Pick. 528 ; 10 Pick. 306 ; 9 Allen,

297; Jarman's Rules, VII, X; Bouvier's Law Dictionary, "Residue," "Remainder."

D. J. McGillicuddy, for the defendant.

The only question presented in this case is whether Honora Callahan takes a fee simple or a life-estate in the demanded premises. We claim a life-estate only. The interpretation of this will is a matter for the court. The cardinal rule in its construction, stated in different language, but well understood, is to give effect to the intent of the testator if it can be done without violating any of the rules of law. Taking the whole will into consideration, what estate did Daniel Callahan intend his wife should have in the premises in question? First he gives to his wife the household furniture, etc. He then gives her the fourteen hundred dollars in the bank. He then disposes of the demanded premises, by giving his wife a life-estate therein. Then follows the ordinary residuary clause. Plaintiff claims that the wife gets an estate fee under this will,—first a life-estate under the third clause and the rest under the residuary clause.

As gathered from the terms of the will fairly considered, what estate did Daniel Callahan intend his wife to have in these premises? Did he intend to give her an estate in fee? If so, why did he not say so in the ordinary and easiest possible manner? Why should Daniel Callahan divide his estate up in this way and give it piece-meal to the same devisee? Why put such a forced and unnatural construction upon the plainly expressed provision of his will? Most certainly such was not his intention.

"A clearly expressed intention in one portion of a will is not to yield to a doubtful construction in another portion of the instrument." 1 Redfield, 407.

FOSTER, J. This case presents a "comedy of errors." The title to the demanded premises was formerly in Daniel Callahan. Both parties claim through him as the source of their title. On June 2, 1864, he made, executed and caused to be recorded, a warranty deed of the premises to one *Joehanan* Callahan—whether his wife or his daughter, is one of the questions in dispute. It is claimed by the plaintiff that the intended grantee

was *Honora* Callahan, Daniel's wife. On the other hand, it is claimed by the defendant that the intended grantee was *Johanna* Callahan, Daniel's daughter. But it is admitted that there was never any delivery of the deed to or for the said *Johanna* Callahan, the daughter.

December 15, 1864, Daniel and his wife joined in a mortgage of the premises to a third party,—the wife being named therein as "*Joehanar* Callahan, wife of the said Daniel Callahan, in her own right," and signing the mortgage by that name.

Thereafter, on June 2, 1868, Daniel died, leaving a will in which the premises are devised to his wife, "*Honnora* Coughalane." December 22, 1874, said *Honora* Callahan, by the name of *Joehanar* Callahan, conveyed the premises to the demandant by warranty deed, duly recorded.

This is the channel through which the demandant claims his title to the demanded premises.

April 8, 1881, *Honora* Callahan quitclaimed her interest in the premises to the defendant, and died in 1882. June 5, 1884, *Johanna* Callahan, daughter of Daniel and *Honora*, quitclaimed her interest in the premises to the defendant.

Although the case as stated does not expressly show the fact, yet it seems to be conceded that the defendant is the son of Daniel and *Honora* Callahan, and he claims title to the premises both by purchase of *Johanna's* interest—whatever it was—and as being heir at law of Daniel after the termination of what he asserts to be a life-estate in the premises devised to *Honora*, instead of an estate in fee.

In other words, the defendant asserts that the wife of Daniel was not the intended grantee in the deed from Daniel to *Joehanar* Callahan of June 2, 1864, consequently she had no estate thereby to convey to the demandant, either by the name of *Honora*, or by the name of *Joehanar*,—and furthermore that she took by devise from her husband a life-estate only, and not a fee in the premises, and could convey only her interest therein, and that at her decease the estate vested in the heirs at law of Daniel, two of whom we may assume from the case and the arguments of counsel, were Timothy Callahan, the defendant, and *Johanna* Callahan, the daughter.

I. If we were satisfied that the wife of Daniel Callahan was the grantee in his deed of June 2, 1864, and that the same had been delivered to and accepted by her, it would not become necessary to proceed further in ascertaining the rights of the parties under the will, as they might then be settled with reference to the deed. But from the evidence before us, and from the circumstances surrounding the transaction, we are inclined to the belief that the grantor did not intend the deed for his wife, but that if he had any intention at all it was to make a deed to the daughter. This deed never received the breath of life, for there was no delivery as the case shows.

II. Whatever title the demandant has, then, must be derived through the will of Daniel Callahan. By the terms of that will, which fully comports with the other proceedings of the parties indicating a total disregard of everything pertaining to legal perspicuity, we find that the testator being of a "sound and perfect mind and memory," bequeaths to his wife, "Honnora Coughalane"—admitted to be identical with Callahan—specific items of personal property, after the payment of his debts and funeral charges; he then devises to her "for and during the term of her natural life," the demanded premises; and by the next clause he gives, devises and bequeaths unto her all the rest, residue and remainder of his estate, real, personal and mixed, wherever found and however situate.

The defendant contends that the intention of the testator is clear, and that the general residuary clause was intended for nothing more than a disposition of those portions of the estate which had not already been disposed of.

We acknowledge the rule which seems to be better established than its application to particular cases, that where the testator makes a general devise or bequest which would include the whole of his estate, and in other parts of the will makes specific dispositions, those specific dispositions are to be regarded as exceptions or qualifications out of the general disposition. Thus in *Cuthbert v. Lempriere*, 3 Maul. and Sel. 158, where a testator, after devising the whole of his estate to A, devises Blackacre to B, the latter devise will be read as an exception out of the first.

But there are other rules equally important in the construction of wills, and one is, that the court will, if possible, adopt such construction as will uphold all the provisions of the will. *Doe v. Davies*, 4 Mees. and Wel. 599. In the attainment of this object the relative order or position of the bequests or devises in the will may be disregarded, if it is possible by the transposition of them to deduce a consistent disposition from the whole will. Furthermore, there must be such a construction as to give effect to the intention of the testator as ascertained from the whole will, provided it is consistent with the rules of law. The will is to be viewed and construed as a whole. Neither is one portion to be treated as repugnant to another if it is possible for both to stand. *Muller's Estate*, 38 Penn. St. 314; *Allgood v. Blake*, L. R. 8 Exch. 163.

If we view the will before us in the light of these principles, we shall find that there are no legatees named other than the wife; and if it be construed as giving the wife only a life-estate, as appears by the third clause to have been at first indicated, then we do not give that force and effect to the succeeding residuary clause which by its language and position it is entitled to. Nor are there any persons named or designated as devisees of the remainder, if only a life interest is to be carved out of the testator's estate. Such a construction would not only be contrary to the express language of the residuary clause, and would uphold only a portion instead of the whole will, but would result in partial intestacy, a result which courts in this country and in England have for a long time sought to avoid unless absolutely forced upon them. It would also be contrary to the introductory words of the will by which the testator at the outset professes to dispose of all his worldly estate in the manner which he indicates. As was said in *Fogg v. Clark*, 1 N. H. 166, "the introductory words of the will intimating the testator's intention to dispose of his whole estate, raise a presumption that the testator by this devise intended to give a fee. Because, if only a life-estate passed by it, the remainder in fee was not disposed of by the will." It is a presumption weighing to a greater or less extent in arriving at the intention of the testator, that by the

making of a will he intends to leave no portion of his estate beyond its operation, unless by express terms he has so indicated. Therefore it is constantly held that a residuary devise, in the ordinary terms, carries with it not only the property of the testator in which no interest is devised or bequeathed in other portions of the will, but also all reversionary as well as contingent interests in property which are not otherwise disposed of by him. *Hayden v. Stoughton*, 5 Pick. 528; *Egerton v. Massey*, 3 C. B. (N. S.) 338 (91 E. C. L.).

Moreover, the fact that the devisee in this case is not only the devisee of the interest specifically devised to her as a life-estate, but also the general residuary devisee, will not exclude her from taking the remaining interest in the estate in the character of a residuary devisee. Jarm. on Wills, * 649.

Thus in *Williams v. Goodtitle*, 10 B. & Cr. 895, (21 E. C. L. 193,) Lord TENTERDEN, C. J., said: "Then it appears that there is a devise to the wife for life, then certain other devises follow; and, lastly, there is a general residuary clause in favor of the wife. It is admitted, that if all that were in a will, the particular devise and residuary clause might well stand together, and the wife would take under the residuary clause."

Again, this same principle is clearly laid down in the case of *Doe v. Gilbert*, 3 Brod. & Bing. 85, (7 E. C. L. 359,) where there was a devise of specific estates, both to the heir at law and the residuary devisee; and it was held that under the general language of the residuary clause, coupled with the intention of the testator, as disclosed by the introductory words of the will, the residuary devisee took an estate in fee, although the words of the specific devise would only have carried an estate for life. "The testator meant to dispose of his whole property," say the court, "and such in general is the intention of testators; but that is not sufficient, unless the will contains words to carry the fee. Here, under the clause containing the devise of the real property, if that clause be taken alone, an estate for life only passes; but the question is, whether it can be connected with the intention to dispose of the whole, expressed in the introductory clause, and with the general words, all my testamentary

estate and effects in the residuary clause, so as to pass the fee."

It is extremely difficult in the construction of wills to be governed by decisions upon other wills framed perhaps in different language. Courts will be cautious in the application of legal principles deduced from what may seem to be analogous cases, and in each case will endeavor to ascertain the meaning of the testator from the language he has used. And in the case before us, taking everything into consideration bearing upon the question, being governed by the well settled rules of law, we can come to no other conclusion than that the widow took an estate in fee in the demanded premises.

III. This being the case, she might lawfully convey the same by deed to the demandant. His deed from her, however, although executed and acknowledged by her in fact, was signed by the name of "*Joehana*" Callahan. She had in her husband's life-time, as it appears, in other transactions in reference to this same real estate, joined with him in a mortgage thereof, adopting and using the same name as in this conveyance in question. By the executing of this deed to the plaintiff, calling herself by the name which, not only on this but on other occasions she had seen fit to adopt, she would be held to be estopped as against this plaintiff from taking advantage of it. No person can avoid his own deed by which an estate has passed by reason of his own hand and his own seal in executing it.

Speaking of this doctrine in *Foster v. Dwinel*, 49 Maine, 48, KENT, J., says: "It is based on the great principle of right, that a man shall not be permitted to contradict what he has solemnly affirmed under his hand and seal; nor shall he deny any act done or statement made, when he cannot do so without a fraud on his part and injury to others." Herman on Estop. § 212; *Sinclair v. Jackson*, 8 Cow. 586.

Further than this, estoppels are not only binding upon parties, but upon privies; privies in blood, as the heir; privies in estate, as the feoffee, lessee, &c.; privies in law, as those upon whom the law casts the estate. Co. Litt. 352, *a*; 1 Gr. Ev. § 23; *Carver v. Jackson*, 4 Peters, 83; *Crane v. Morris*, 6 Peters, 611. They are not binding upon strangers, nor upon those claim-

ing by title paramount to the deed or instrument creating the estoppel. But inasmuch as the widow, as devisee in her husband's will, took an estate in fee and was capable of conveying the same, as in fact she did by deed of warranty, this defendant can not be said to be a stranger, nor claiming by title paramount to hers so as to avail him in this action. He will be held to be estopped equally as would the grantor herself.

Judgment for demandant.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

EDWARD R. BRANCH vs. ANDREW J. LIBBEY.

Kennebec. Opinion June 22, 1886.

78	321
103	36

Ways. Defects. Evidence.

In an action against an individual for injuries sustained on account of defects or improper obstructions made by the defendant in a way, evidence is not admissible to prove that other persons passed safely over the alleged defect.

On exceptions from the superior court.

An action of the case to recover alleged injuries claimed to have been sustained by the plaintiff to himself, his horse and carriage, by reason of an alleged defective granite crossing in Oakland. The crossing was built by the defendant by order of the selectmen. The plaintiff, in driving over the crossing on the same day that it was built, met with the accident which caused the injuries, and he claimed the accident was caused by the defective and unsafe condition of the crossing.

The defendant denied that the crossing was in an unsafe condition; and he was allowed against the plaintiff's objections to prove that, just before and just after the plaintiff's accident, other persons drove over the crossing without injury.

Brown and Carver, for the plaintiff, cited: *Collins v. Dorchester*, 6 Cush. 396; *Standish v. Washburn*, 21 Pick. 237; *Aldrich v. Pelham*, 1 Gray, 510; *Kidder v. Dunstable*, 11 Gray, 342; *Schoonmaker v. Wilbraham*, 110 Mass. 134;

Merrill v. Bradford, 110 Mass. 505; 109 Mass. 126; 6 Cush. 524; 3 Cush. 174; 7 Gray, 86; 1 Allen, 187; 112 Mass. 455; 1 Pick. 171; 127 Mass. 524; 122 Mass. 541; 97 Mass. 346; *Hubbard v. And. & Ken. R. R. Co.* 39 Maine, 506.

G. T. Stevens, for the defendant.

The evidence tending to show the effect of the cross walk upon the public travel, its character and its capacity to do mischief or otherwise, was admissible. *Crocker v. McGregor*, 76 Maine, 282. In that case, LIBBEY, J., said: "The issue was whether a mill constructed and used with the steam escaping into the way was a nuisance to the public travel. Evidence showing that it naturally frightened ordinary horses when being driven by it, was competent to show its effect upon public travel, its character and its capacity to do mischief."

The evidence complained of in the case at bar tended to show the capacity of the inanimate thing, the cross walk, to do the mischief or not to do the mischief complained of.

FOSTER, J. The only question presented by this bill of exceptions is upon the admissibility of evidence, against the plaintiff's objection, by which the defendant was allowed to prove that just before and just after the accident to the plaintiff, other persons drove over the street crossing without injury.

Without discussing or even expressing any opinion in relation to the merits of the plaintiff's claim which he sets up against this defendant, we think the evidence was improperly admitted. It has been repeatedly held in actions against towns for injuries sustained on account of alleged defects in highways therein, that evidence is not admissible to prove that a person other than a party to the action, has either passed safely over the alleged defect, or has received an injury at that place. Such evidence is not competent either for the purpose of proving that the way was defective, or in suitable condition, at the time and place of the alleged injury, or as a test of the degree of care exercised by the plaintiff. In support of these principles only a few of the numerous cases need be cited, among which are the following: *Aldrich v. Pelham*, 1 Gray, 510; *Collins v. Dorchester*, 6

Cush. 396; *Kidder v. Dunstable*, 11 Gray, 342; *Schoonmaker v. Wilbraham*, 110 Mass. 134; *Hubbard v. A. & K. R. R. Co.* 39 Maine, 506; *Hubbard v. Concord*, 35 N. H. 52.

The reason assigned for rejecting such evidence is that it is not pertinent to the issue, but is evidence concerning collateral facts tending "to draw away the minds of the jury from the point in issue, and to excite prejudice and mislead them; and, moreover, the adverse party having no notice of such a course of evidence, is not prepared to rebut it." 1 Greenl. Ev. § 52. As was said by this court in *Parker v. Portland Publishing Co.* 69 Maine, 175, the entire weight of judicial authority is against the reception of such evidence. And in *Moulton v. Scruton*, 39 Maine, 288, it was held that such evidence was inadmissible upon cross examination. If admitted, each case would present a distinct issue, with all its attendant circumstances, including the degree of care, the rate of speed and the kind of vehicle, with which each person was driving. The attention of the jury would thus be diverted from the main issue, and directed to what is unimportant and purely collateral.

In this case it appears from the exceptions that the evidence admitted went further than was allowable. It went further than showing the mere fact of other persons having driven over the crossing, thereby affording them an opportunity of observing its actual condition, and concerning which they might properly have been allowed to testify. It went so far as to introduce before the jury the effect produced,—that others drove over the crossing without injury. The jury may have been more or less influenced by this testimony. It was inadmissible.

Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and EMERY, JJ., concurred.

HENRY K. WHITE and another vs. O. M. KILGORE and trustees.

Somerset. Opinion June 22, 1886.

78	828
96	414

Trustee process. Costs. Claimant of funds.

The statutory rule that the prevailing party recovers cost, does not apply to a controversy between the plaintiff in a trustee action and a claimant of the

fund trustee; costs in such a matter may be awarded as in equity; it is substantially an equitable proceeding.

ON EXCEPTIONS.

Trustee process. The case has been once before the law court and is reported in 77 Maine, 571. The exceptions here were by the plaintiffs to the rulings of the presiding justice, as a matter of law, that neither the plaintiffs nor the claimants (Hussey and Conant) to the funds in the hands of the trustee were entitled to costs.

Walton and Walton, for the plaintiffs, contended that the plaintiffs were the prevailing party and entitled to costs. The trustee was first discharged on the ground that the fund in his hands belonged to the claimants. The plaintiffs alleged exceptions and they were sustained by the law court and the trustee was charged for thirty-six dollars and nine cents, and the balance of the fund, twenty-four dollars and forty-four cents, was given to the claimants.

This was upon an issue framed by the claimants. They could claim the whole or a part of the fund. They claimed the whole. The plaintiffs had no voice in making up the issue. They had to take what was tendered to them as it was tendered, and they were compelled to join the issue or give up their right to the whole fund. They joined the issue. The presiding justice decided against them. They thereupon had the extra expense of printing the case for the law court, where their exceptions were sustained and the trustees charged. They are clearly entitled to costs. R. S., c. 82, § 117.

C. A. Harrington, for the claimants, cited: *Brainard v. Shannon*, 60 Maine, 342; *Simpson v. Bibber*, 59 Maine, 196; *Stedman v. Vickery*, 42 Maine, 132.

PETERS, C. J. This case involves the question of costs between a plaintiff in a trustee process, and an intervening claimant of the fund trustee. Each claimed to hold the whole fund, the plaintiff by his attachment, and the other party by an assignment from the person trustee. Each party sustained

his claim in part, the result dividing the fund not far from equally. No statutory provision exactly hits the question presented. In some of the states there are statutes allowing the court to exercise a discretion in granting costs in such cases. We think it not unfitting that we should assume a discretion in the matter, following the rule that governs in equitable proceedings. The present proceeding is really an equitable interference for the settlement of the ownership of a fund, although the question arises in an action of law, but not between the principal parties to the action. The presiding judge allowed costs to neither party. That can not be deemed an inequitable ruling.

Exceptions overruled.

ALL CONCUR.

SAMUEL R. FULLER vs. JOSEPH R. LUMBERT.

Penobscot. Opinion June 25, 1886.

Husband and wife. Promissory notes. Consideration.

78	325
109	88
78	325
105	570

An express promise by a husband to his wife, to pay her money to help support her and their child, does not change their relative rights and obligations, and hence is not supported by a legal consideration.

A promissory note given for the same purpose, to the wife, or to a third party for her benefit, falls within the principle above stated, and is without legal consideration.

ON REPORT.

Assumpsit on a promissory note. The facts are stated in the opinion.

Davis and Bailey, for the plaintiff.

This action is properly brought in the name of Fuller. *Sherwood v. Roys*, 14 Pick. 172. Uncancelled endorsement no objection. *Thornton v. Moody*, 11 Maine, 253.

Not necessary that plaintiff should have any beneficial interest in the note. *Demuth v. Cutler*, 50 Maine, 298; *Whitcomb v. Smart*, 38 Maine, 264; *Nat. Pemberton Bank v. Porter*, 125 Mass. 335.

Consent pending proceedings that the case may go on in his name, is a ratification by plaintiff of the previous proceedings.

Lewis v. Hodgdon, 17 Maine, 267; *Craig v. Twomey*, 14 Gray, 486; *Golder v. Foss*, 43 Maine, 364.

It is not necessary that the consideration should be adequate, "the smallest spark of consideration is sufficient." *Sanborn v. French*, 22 N. H. 248; and a total want of consideration is necessary to make them void. *Darron v. Walker*, 48 Superior Court, (N. Y.) 6. Being for future support, the consideration is executory and supports the promise. *Loomis v. Newhall*, 15 Pick. 159.

A husband may contract with his wife, living apart from him, to support herself, for a stipulated sum, and the terms of such a contract are binding on both. *Alley v. Winn*, 134 Mass. 77, and cases cited, and *a fortiori* for the support of the child. See also *Page v. Trufant*, 2 Mass. 158.

It is as much a legal obligation as a loan of money to him, for which latter he might have given his promissory note, and for which after divorce she could sue him and recover the amount. *Webster v. Webster*, 58 Maine, 139; *Carlton v. Carlton*, 72 Maine, 115.

Another feature of this case is, that these notes were given pending a divorce suit on the libel of the wife. A note given for the benefit of the child under these circumstances, puts the case on all fours with that of *Stilson v. Stilson*, 46 Conn. 15.

Upon this phase of the case, it is not unlike *Adams v. Adams*, 24 Hun. 401, affirmed in 91 N. Y. 381.

Upon the point whether the note given by a husband to a trustee for the benefit of the wife is upheld by the law, see *Phillips v. Meyers*, 82 Ill. 67; S. C. 25 Am. Rep. 295; see *Amherst Academy v. Cows*, 6 Pick. 427.

The existence of the notes and an obligation for which they might have been given is sufficient for that purpose. *Dean v. Carruth*, 108 Mass. 242.

Wilson and Woodward, for the defendant.

Defendant is not prejudiced because suit is in name of a trustee. *Demuth v. Cutler*, 50 Maine, 298.

Courts carefully scrutinize contracts between husband and

wife. *Blake v. Blake*, 64 Maine, 177; *Robinson v. Clark*, 76 Maine, 493; *Lane v. Lane*, 76 Maine, 521.

The following cases were unlike the case at bar: *Loomis v. Newhall*, 15 Pick. 159; *Alley v. Winn*, 134 Mass. 77; *Webster v. Webster*, 58 Maine, 139; *Carlton v. Carlton*, 72 Maine, 115; *Stilson v. Stilson*, 46 Conn. 15; *Adams v. Adams*, 91 N. Y. 381.

The note must be given in satisfaction of an obligation. *Warren v. Durfee*, 126 Mass. 338.

EMERY, J. From the evidence we gather the following facts: The defendant, Lumbert, with his wife and child, lived for a while in Chicago. Lumbert afterwards came to Bangor, leaving his wife and child in Chicago. The wife afterwards began proceedings in Chicago for a divorce, and notice thereof was served on Lumbert in Bangor. Pending the proceedings, Lumbert visited Chicago and had some talk with his wife and gave her the notes in suit. The notes were by agreement made payable in form to the nominal plaintiff, but they were given to the wife as her notes. The nominal plaintiff never had any interest in them. The wife afterwards procured a decree of divorce upon the same proceedings and then put these notes in suit.

The vital question is, what was the consideration for the notes? The wife had some income of her own. She had, by her income and her labor, supported herself and her child for some time. The defendant, her husband, had not contributed for some time to their support. She claimed she had paid some bills for her husband. This last stated fact might have been a consideration for the notes, at least in part, had the notes been given for such bills. Such, however, does not appear to be the fact. The wife, in her deposition, states what the notes were given for. She says: "He (the defendant) told me at the time he gave the notes, that he had not supported us as he ought; that he had not done right; that he would give these notes and would pay them when they became due; that he had no money, but could raise the money by the time the notes were due; that he was

sorry he could not do more ; that he regretted I had been obliged to take care of myself and our child for so long, and that he would support the child in addition to the notes. *The notes were to help take care of myself and child.*"

What thing, or right, or claim, did the wife give up for these notes? What gain or relief did the husband gain by giving them? The wife had no cause of action against her husband for what she had done in the past for the support of herself and child. She would have had no cause of action for future self support. She could not legally charge him as her debtor with sums so expended. Third parties furnishing such support might have claims therefor, enforceable by action against the husband, but the wife herself could not have such a claim. Her remedy for non-support was by divorce, which remedy she availed herself of.

The husband was legally bound to support his wife and child before the giving of the notes, and he was equally so bound afterwards. He obtained no release from any obligation. It does not appear that she agreed to support herself or child thereafter, or to relieve him of any part of his legal obligations. The notes were only to help. He obtained no advantage, and she gave up no advantage.

Had she written to him at Bangor for money for the same purposes for which the notes were given, and he replied that he would send the money the next week, such a promise would not be a debt against him nor against his estate after his decease. Property conveyed by him to her to satisfy such a promise could not be held by her against his creditors. Probably a husband often promises money to his wife for her past and future expenses, but such promises are never thought to constitute the wife the legal creditor of the husband. These notes were only similar promises more formally evidenced. They were not gifts, but only promises. The consideration can be inquired into, as they have not been transferred. The writing and delivery of these notes caused no change in the situation, or in the relative rights or duties of either party. Nothing was acquired by the one, or surrendered by the other. The wife's account of the

transaction shows it was not a business one, and that the notes were not given for a legal consideration.

Plaintiff nonsuit.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

MARK MCPHETERS vs. MOOSE RIVER LOG DRIVING COMPANY.

Piscataquis. Opinion June 30, 1886.

Waters. Floatable streams. Log Driving. Reasonable use. Damages.

Where one deliberately and without compulsion selects a particular portion of a floatable stream for the storage of logs, and thereby prevents another from entering such common highway with a drive of logs from a tributary stream, he is liable to such other person for the damages occasioned thereby.

Wages and board of men while waiting for a reasonable time would be an element of damage; so too, would the expense of moving one crew out and another in, as well as the increased cost, if any, of making the drive the next season, and the interest on the contract price for making the drive during such time as the payment thereof was delayed, because of inability to complete the drive on account of such obstruction.

The loss of supplies left in the woods for use when completing the drive, and destroyed by wild beasts, would not constitute an element of damage.

ON REPORT.

An action of the case for obstructing the drive of the plaintiff on Tom Fletcher brook in the spring of 1881. The opinion states the case.

The report provided that the law court should render judgment according to the law of the case; and it also provided as follows: "If judgment be for plaintiff the court may declare the principles upon which damages are to be assessed, and such assessment shall be at *nisi prius*. The court in its discretion may declare the principles of law governing the case, and send the case back for trial by a jury."

Henry Hudson, for the plaintiff, cited, upon the right of passage: *Brown v. Chadbourne*, 31 Maine, 9; *Veazie v. Dwinel*, 50 Maine, 484; *Knox v. Chaloner*, 42 Maine, 155; Gould, Waters, §§ 95-97; *Davis v. Winslow*, 51 Maine, 297; *Lancey*

78	329
95	880
78	329
103	48
78	329
104	243

v. *Clifford*, 54 Maine, 489; *Pearson v. Rolfe*, 76 Maine, 384; *Parks v. Morse*, 52 Maine, 260. Obstructions in floatable streams are nuisances. *Arundel v. McCulloch*, 10 Mass. 70; *Gerrish v. Brown*, 51 Maine, 262; *Brown v. Watson*, 47 Maine, 163; *Brown v. Black*, 43 Maine, 443. A person injured by a public nuisance entitled to damages. *Cooley*, Torts, 618; *Dudley v. Kennedy*, 63 Maine, 465; *Stetson v. Faxon*, 19 Pick. 147 and other cases above cited. Upon the effect of the defendant's charter counsel cited: *Plummer v. Penobscot Lumbering Association*, 67 Maine, 367; *Gould, Waters*, § 35; *Com. v. Breed*, 4 Pick. 463.

A. G. Lebroke and *W. E. Parsons*, for defendant.

The damages are too remote, and when damages in matters not necessarily resulting are claimed, they must be set out in the writ and established by proofs. *Sedgwick on Damages*, 65, 66 (4 ed.). They cannot be recovered unless proximate even if claimed in the writ. *Ibid.*; *Armstrong v. Percy*, 5 Wend. 536.

It may well be doubted whether any damages, not naturally resulting from an alleged grievance, can ever be considered proximate, or whether they can be taken into consideration at all by the tribunal. *Sedgwick on Dam.* 65, 66. No damages can be claimed for the loss of a collateral contract. *Bridges v. Stickney*, 38 Maine, 361.

If one by tort delay a vessel so that expense occurs to get her off, defendant is liable only for the expense of getting her off, but not for the delay of a voyage. *Benson v. Malden*, 6 Allen, 149; *Fuller v. Chicopee Manuf'g Co.* 16 Gray, 46. Speculative damages are not allowed. *Gould on Waters*, 212, and notes.

Damages are given as compensation, recompense or satisfaction to the plaintiff, for the injury actually received; and they must be the natural and proximate consequence of the act complained of. *Longfellow v. Quimby*, 29 Maine, 196; *Worcester v. Great Falls Manuf'g Co.* 41 Maine, 159; *Ingledeu v. Northern R. R.* 7 Gray, 86; *Shaw v. Boston and Worcester Railroad*, 8 Gray, 45; *Furlong v. Polleys*, 30 Maine, 491; *Bridges v. Stickney*, 38 Maine, 391; *Loker v. Damon*, 17 Pick. 284; *Sibley v.*

Hoar, 4 Gray, 222; *Goddard v. Barnard*, 16 Gray, 205; *Emery v. Vinall*, 26 Maine, 295; *Smith v. Grant*, 56 Maine, 255; *Winslow v. Lane*, 63 Maine, 161; *Ripley v. Mosely*, 57 Maine, 76; *Wing v. Chase*, 35 Maine, 260; *Waite v. Gilbert*, 10 Cush. 177; *Thompson v. Shattuck*, 2 Met. 615; *Barnard v. Poor*, 21 Pick. 378; *Noble v. Ames Manuf'g Co.* 112 Mass. 492; *Noxon v. Hill*, 2 Allen, 215.

If the damages sustained are not the necessary consequence of the act complained of, they can be recovered only when specially set forth in the declaration and proved on trial. *Furlong v. Polleys*, 30 Maine, 491; *Patten v. Libbey*, 32 Maine, 378; *Dickinson v. Boyle*, 17 Pick. 78; *Baldwin v. Western R. R.* 4 Gray, 333; *Knapp v. Slocomb*, 9 Gray, 73; *Hunter v. Stewart*, 47 Maine, 419; *Adams v. Barry*, 10 Gray, 361; *Parker v. Lowell*, 11 Gray, 353; *Rising v. Granger*, 1 Mass. 47.

The charter of the defendant corporation is radically different from the charter of Penobscot Log Driving Company referred to in Weymouth against that company, 71 Maine, 29. McPheters *pro hac vice* may be regarded the owner. *Tibbets v. Tibbets*, 46 Maine, 365.

The act of an employee outside his special duty is not the act of the company. *Gardner v. Boston and Maine R. R. Co.* 70 Maine, 181.

EMERY, J. From the evidence we gather the following facts: Moose River rising in the mountains near the Canada line, and gathering the waters of numerous tributaries, flows easterly through Long Pond, Little Brassua Lake, Great Brassua Lake, and into Moosehead Lake, nearly opposite Mt. Kineo. The distance from Long Pond down to Little Brassua is some four miles, and for that space the river flows over rapids. From Little Brassua down to Great Brassua is some four miles of nearly dead water. Across Great Brassua Lake to its outlet is about three and one-half miles, and from there to Moosehead Lake is about four miles.

About two and one-half miles above Great Brassua, a stream called the "Tom Fletcher Brook," flows into Moose River from

the north. Both "Tom Fletcher" stream and Moose River are floatable streams and public highways for the passage of logs.

The defendant corporation, by c. 179 of special laws of 1879, was incorporated to "drive all logs and other timber, coming into said Moose River between Moose River Bridge (above Long Pond,) and Moosehead Lake, for the purpose of being driven to market," &c. The corporation was authorized to "erect booms and dams where the same may be lawfully done, and to use steam and other power for the purpose of towing logs and booms." The charter does not state how far the corporation must drive the logs, but it gives authority to drive them to market, which would be down the Kennebec river. In fact, however, the corporation in the first two years of existence, had only driven logs into Moosehead Lake, and there turned them over to another company to be towed.

In September, 1880, the plaintiff took a contract to cut and haul logs into the "Tom Fletcher," and to drive them down the "Tom Fletcher" into Moose River. In the following October he began operations in the woods under this contract. At this time Moose River was substantially clear of logs from Long Pond to Great Brassua Lake. Between Great Brassua and Moosehead there were some three million feet of left over logs. This condition of the river was noted by the plaintiff. There had also been left over above the Long Pond rapids some twelve million feet or more, and in the fall of 1880, after the plaintiff had gone into the woods, the defendant drove these logs down. They did not drive them into Moosehead Lake, as they could have done, but swung a boom across Moose River at its outlet into Great Brassua, — drove the logs down against that boom, entirely filling the river with them up some distance above the outlet of the "Tom Fletcher," and there left them for the winter.

In the spring of 1881, the plaintiff with his drive of logs arrived at the outlet of the "Tom Fletcher" before the spring drive on the Moose River, under the care of the defendants had arrived at the same point. Had it not been for the storage of the logs in the river above Great Brassua, by the defendants the previous fall, the plaintiff could have turned his logs into Moose

River, and so fully performed his contract. As it was, the plaintiff found the river full of old logs, with no space to receive his logs. In a few days the spring drive of the Moose River, some fifty million feet, came down against the old logs, and before the drive passed the "Tom Fletcher," the driving season was over, and the plaintiff's logs were stranded in the "Tom Fletcher."

The defendants had as much right as the plaintiff to use Moose River for driving purposes. If they fairly occupied the river first with their logs, they could claim precedence, and the plaintiff would need wait, provided they used reasonable diligence and efforts to propel their drive. They were under no obligation to hold up and let the plaintiff put his logs in ahead, or even in the midst of their drive. If the plaintiff reached the river later than the defendants, he would be obliged to wait, and his loss would be *damnum absque injuria*. If the defendants in such case used reasonable diligence and efforts, they would not be responsible, even though they made temporary delays for purposes of booming, &c.

But the defendants the fall before, had deposited logs, in this particular part of the river opposite the "Tom Fletcher" stream, for storage during the winter. These logs were not stranded at this place for want of water. They could have been driven past the "Tom Fletcher," but this locality was selected by the defendants as the most convenient place for the storage of the logs. It was not the Moose River spring drive, that by arriving first, occupied the space. What prevented the plaintiff putting his logs into Moose River, was not the use of the river at that point by the defendants for driving purposes, but their use of it for storage purposes.

As we have before said, temporary delays and rests may be justifiable in the driving of logs, if they are not unreasonable in time or place. But when parties deliberately and without compulsion by nature select a particular portion of a river as a place for a season's storage of their logs, and thus completely block up another's entrance into the common highway, we think they are exceeding their right, and are legally liable for damages

thereby caused. Parties desiring to use any part of a river for such storage, should select such places as will least obstruct others in their use of the river. The defendants here must have known that logs would be likely to come down the "Tom Fletcher" early the following spring, and require entrance into Moose River. They should not have stored their old logs across the mouth of the "Tom Fletcher" if any other place could have been found.

In this case it is urged that there was no other place where the left over logs could have been safely kept during the winter. It was, perhaps, the most convenient place, but the evidence does not satisfy us that it was the only safe place. We think the logs could, with some extra care and expense, perhaps, have been safely stored where they would not have obstructed the "Tom Fletcher" stream. As it was, three million feet of logs were left between Brassua and Moosehead Lakes, and no harm is shown to have come to them.

After careful consideration of the evidence, we think the plaintiff is entitled to recover upon the grounds above indicated. He is then entitled to such damages as are the natural and necessary results of the acts and omissions of the defendant, which we have found to be unreasonable.

The wages and board of his men while thus detained would be an element of damage. He could not, however, employ an unnecessary number of men, nor keep them under pay after it became evident they could not be utilized that season. It is only for a reasonable number, and a reasonable time that he could recover.

As the acts or omissions of the defendant compelled the plaintiff to move his men out of the woods, without accomplishing their work, and move them back again the next season, an expense he would not otherwise have incurred, we think such expense would be an element of damage.

The final payment on the contract was due in June, but the plaintiff was prevented by the defendant from earning it till the next May. The loss of interest on such payment, during such enforced delay, would seem to be an item of damage.

The loss of the provisions, clothing, &c., left behind in the woods, is, we think, too remote. These articles might have been taken from the woods, though at some expense, but the plaintiff chose to leave them, and they were destroyed by animals and the weather. Their destruction was from a nearer cause than the defendant's acts.

The increased cost, if any, of moving the logs in the spring of 1882, over that of moving them the first spring, would, perhaps, be an element of damage, if clearly shown to result from the defendant's acts. The evidence before us, however, does not make it sufficiently certain what of the increased cost was owing to the defendant's acts. Should the case go to a jury for the assessment of damages, such evidence can be put in.

The plaintiff, since the report was made up, has filed a stipulation to abide by the court's assessment of damages, in order to end the case, and we assess damages as follows: For loss of time and expenses of plaintiff and his men, while waiting to put the logs into Moose River the first season, say seventeen men for six days, at two dollars and seventy-five cents each per day, for wages and board, two hundred eighty dollars and fifty cents. For interest on the delayed payment of twelve hundred dollars for eleven months, sixty-six dollars. For the extra expense of moving one crew out, and another crew into the woods the following spring, say one hundred dollars; in all, four hundred forty-six dollars and fifty cents, with interest from the date of the writ. The entry should be,

Judgment for the plaintiff. Damages to be assessed by a jury at nisi prius upon the principles above stated, unless the defendant within twenty days after filing of this rescript elect to abide by the assessment made by the court herein. If the defendant so elect, the judgment to be for \$446.50, with interest from the date of the writ.

PETERS, C. J., DANFORTH, VIRGIN and FOSTER, JJ., concurred. HASKELL, J., concurred in the result.

JOSHUA TRASK vs. ANSEL WADSWORTH.

Lincoln. Opinion June 25, 1886.

*False imprisonment. Action against sheriff. Statute of limitations.**R. S., c. 81, §§ 83, 84.*

An action against a sheriff for false imprisonment, by the act of a deputy, must be brought within two years after the cause of action accrues.

ON EXCEPTIONS.

At the trial after the plaintiff's testimony was out, the court, on motion of the defendant, ordered a nonsuit. To this ruling the plaintiff alleged exceptions.

The opinion states the case and material facts.

L. M. Staples, for the plaintiff, contended that this action was maintainable under R. S., c. 81, § 83, which gives a four years' limitation.

This action is against the sheriff and it is for the misconduct of a deputy.

William H. Fogler, for the defendant, cited: 2 Addison, Torts, 700; 3 Wait's Actions and Defences, 313; 1 Chitty, Pl. 167; R. S., c. 81, § 84; *Sibley v. Estabrook*, 4 Gray, 295.

DANFORTH, J. This is an action against the sheriff of Waldo county for the alleged false imprisonment of the plaintiff, by the act of his deputy. The suit was commenced more than two years after the act complained of, and the defendant pleads the statute of limitations.

R. S., c. 81, § 83, provides that "actions against a sheriff for the negligence or misconduct of himself, or his deputies, shall be commenced within four years after the cause of action accrues." Section 84 of the same chapter provides that "actions for false imprisonment . . . shall be commenced within two years after the cause of action accrues." The former section is general in its terms, the latter specific, and must, when applicable, be construed as an exception to the first; otherwise the two can not stand together. The present action comes distinctly and

clearly within the provisions of § 84. If it were directly against the deputy, there can be no doubt the two years' limitation would apply. The deputy is still the responsible party and he can not be made liable indirectly when he is not directly. The time in which the action would be barred can not be increased by this indirection in the remedy sought.

This same question, under a like statute, has been before the court in Massachusetts, and in a satisfactory opinion the same result has been reached. *Sibley v. Estabrook*, 4 Gray, 295.

Exceptions overruled.

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

EMELINE WHITTEMORE, in equity,
vs.

CHARLES B. RUSSELL, administrator, and others.

Franklin. Opinion June 29, 1886.

Equity practice. R. S., c. 77, §§ 20, 23, 25.

The law court has no jurisdiction of a cause in equity reported upon agreement of counsel alone. The methods of procedure provided by R. S., c. 77, §§ 20, 23, 25, only, can give the law court jurisdiction in such cases.

BILL IN EQUITY.

The case came to the law court upon the following agreement signed by the respective counsel: "Emeline Whittemore, in eq. v. Charles B. Russell, Adm'r, et als. The above case is hereby made law by agreement of parties. Replication waived. Bill, answer and depositions of James P. Russell and Emeline Whittemore to make case."

J. C. Holman, for the plaintiff.

S. Clifford Belcher, for the defendant.

HASKELL, J. Causes in equity come before the law court by two methods of procedure. R. S., c. 77, §§ 20, 23 and 25.

I. After decree, entered by the presiding justice at *nisi prius*, upon appeal, or bill of exceptions.

II. Upon report, when the presiding justice is of opinion and so certifies in the record, that any question of law is involved of sufficient importance, or doubt, to justify the same, and the parties agree thereto.

Of this cause, the law court takes no jurisdiction from the record presented, and has no power to hear and determine the same.

Dismissed from the law docket.

PETERS, C. J., WALTON, VIRGIN, EMERY and FOSTER, JJ., concurred.

JOHN C. GRAHAM vs. CHAPLIN VIRGIN and others.

Oxford. Opinion August 5, 1886.

Mills and mill-dams. Flowage. Practice.

Where an owner of land conveyed to another a mill and a limited water supply therefor, the conveyance restricting the grantee's right of flowage over the grantor's other land to an extent that would ensue from a dam, at the mill, only four feet high, such grantee is not thereby debarred from attempting to obtain a higher flowage under the flowage act; and, for raising the head of water higher than the deed prescribes, the grantor's remedy in the first instance is under the flowage act, and not by suit at common law.

An action of the case for flowing the plaintiff's meadow on a stream not navigable. The verdict being for the plaintiff, the defendant alleged exceptions to the instruction stated in the opinion.

David Hammons, for the plaintiff.

We say that no complaint for flowing could be sustained, and that the present is the only proper action. Where the verdict of a jury in complaint under the mill act has been violated or disregarded an action at common law will lie. *Hill v. Sayles*, 4 Cush. 549; *same v. same*, 12 Met. 142; *Fiske v. Framingham Manuf'g Co.* 12 Pick. 68, see also 17 Mass. 76.

Both parties had full notice of the provisions in each deed at the time of their execution. By the acceptance of these deeds from Mrs. Moore to Graham and to Hoyt, did they not assent and agree to the stipulations or provisions contained in each of the two deeds? We think, yes.

Each party in this case went into immediate possession and so continued for twenty-five years up to the date of this writ. Hoyt, and grantees of the mill, and Graham, of his farm. The exceptions so state. 26 Maine, 224; 5 Pick. 135; 7 Pick. 111.

The conveyance of a mill will carry the land on which it is situated, unless the language of the deed shows a different intent, but if it shows an intent not to include the land it will not. *Blake v. Clark*, 6 Glf. 436; *Moore v. Fletcher*, 16 Maine, 63; *Farrar v. Cooper*, 34 Maine, 397.

A. E. Herrick with *J. P. Swasey*, for the defendants, cited :: *Moore v. Fletcher*, 16 Maine, 63; *Baker v. Bessey*, 73 Maine, 479; *Dingley v. Gardiner*, 73 Maine, 65.

PETERS, C. J. The parties to this action respectively hold certain rights in real estate under a common grantor. That grantor, Clementine Moore, conveyed to the plaintiff a farm upon which were a meadow and mill, excepting from the conveyance the mill and privilege; the deed containing a clause, for the benefit of the grantee, that the water was "not to be raised over four feet at the mill after the first of June till after the first day of September of each year."

On the same day, the grantor conveyed to another party, under whom the defendants hold, the mill and privilege that are excepted from the land conveyed to the plaintiff, the latter deed containing this stipulation: "Between the first day of June and the first day of September in each year the water at the mill is not to be raised over four feet."

The question of the case is, whether a common law action lies against the defendants for raising their dam so as to flow more than the four feet, or whether the plaintiff's remedy for such injury to his meadow is under the flowage act. The instruction was given, that, if the original grantees, in the two deeds, received their conveyances and entered into possession of the properties, at the same time, an agreement exists, as between the grantees and their successors, by which the height of the water can be maintained at four feet only, and that an action of case may be

maintained for any injury to the plaintiff's meadow caused by additional flowage. We think the ruling was erroneous.

There is no doubt that the defendants were unauthorized by the deed to more flowage than four feet. They are estopped from claiming a greater measure than that for the consideration paid by their grantor for the mill and privilege. They can create no additional flowage without additional compensation. But we fail to perceive any either express or implied covenant in the deeds that will prevent the mill-owners getting a greater privilege in some other way. They have made no promise that they will never purchase any, or that they will not take more under the flowage act. There is no agreement that the premises shall never be otherwise occupied than as stipulated in the deeds. The plaintiff contends that as the parties to the deeds once agreed what the flowage should be, an action lies for a disturbance of their right, in the same way that an action of case is provided by the flowage act for the disturbance of rights fixed under that act. But there is the fallacy. The agreement establishes the amount of flowage which the party is entitled to under his deed — for the consideration paid for the deed. The defendants now seek the right of a further water-height under the flowage act, and the plaintiff should have pursued his remedy under the statutory proceeding, in which it can be determined whether the defendants shall be permitted to obtain a more liberal flowage by paying for it, and, if so, to what extent. Had the defendants' predecessors purchased the mill without any right of flowage, it would hardly be pretended that they were debarred from attempting to obtain such right, by means of the flowage act. There can be no difference in principle, whether the mill was purchased with no right of flowage, or with not enough.

Exceptions sustained.

WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

VIRGIN, J., did not sit.

CHARLES B. PLUMMER, Administrator,

vs.

WILLIAM DOUGHTY and others.

Androscoggin. Opinion August 5, 1886.

*Mortgages. Executors and administrators. Foreclosure. Bond for support.
Widow. Dower.*

The interest and title of a mortgagee in real estate, upon his decease, vests as assets in his executor or administrator, who is the proper party to any proceeding for the foreclosure of the mortgage.

Where suit is brought to foreclose a mortgage, on account of a breach thereof, given to secure a bond for the support of a husband and wife during their natural lives, a breach of such bond must be shown, but such breach need not be shown to have occurred during the lifetime of the husband who died first.

If there has been a breach of the bond since the death of the husband and before the commencement of the suit, it is sufficient to maintain the action. Nor is it necessary, to entitle a recovery in such case, to show that any claim had been made by the widow for her support, on the administrator of the deceased mortgagor, before suit was commenced.

The widow of the deceased mortgagee, who had dower interest in the premises which she had not released, has no such legal estate in the premises, before her dower has been set out or assigned to her, as would entitle her to convey any part of the premises to a third person, as against the administrator of the deceased mortgagee.

ON EXCEPTIONS.

Writ of entry, dated March 28, 1884, brought by the administrator of the estate of Abel Tracy, deceased, to foreclose a mortgage. On the 26th of April, 1878, Tracy gave to J. Frank Hayward a deed of his homestead farm in Durham. His wife did not join in the conveyance. On the same day Hayward gave to Tracy a mortgage back to secure a bond for maintenance as stated in the opinion. Tracy died December 28, 1878; Hayward died July 7, 1882, and an administrator on his estate was appointed January 8, 1884. Other material facts are stated in the opinion.

Newell and Judkins, for the plaintiff.

On a bond for the support of two persons, the burden of proving performance is on defendant. *Philbrook v. Burgess*, 52 Maine, 272; *Jarvis v. Sewall*, 40 Barb. 449; *Perkins v. Rogers*, 20 Conn. 81. The bond runs during the life of the survivor. *Merrill v. Bickford*, 65 Maine, 118; *Douglass v. Parsons*, 22 Ohio St. 526. The obligation is personal to be performed by obligor, or his administrator. *Eastman v. Batchelder*, 36 N. H. 141; *Bethlehem v. Annis*, 40 N. H. 34; *Flanders v. Lamphear*, 9 N. H. 201; *Bryant v. Erskine*, 55 Maine, 156; *Clinton v. Fly*, 10 Maine, 292. Administrator must enforce security. *Felch v. Hooper*, 20 Maine, 163. Widow cannot claim to occupy any part as dower until it is assigned. *Wyman v. Richardson*, 62 Maine, 295; *Bolster v. Cushman*, 34 Maine, 428; *Leonard v. Motley*, 75 Maine, 421; 4 Kent's Com. (12th ed.) *61; *Colburn v. Grover*, 44 Maine, 47. A mortgagee may take possession before a breach. R. S., c. 90, § 2; *Mason v. Mason*, 67 Maine, 546; *Allen v. Parker*, 27 Maine, 531.

C. Record, for the defendants, and *Asa P. Moore*, for the defendant, Sidney Bowie.

In a mortgage to secure a bond for support on the premises, the mortgagee is entitled to possession until a breach is shown; this is implied from the nature of the transaction. In order to support on the premises, the premises must be under his control. *Bean v. Mayo*, 5 Maine, 89; *Brown v. Leach*, 35 Maine, 39; *Lamb v. Foss*, 21 Maine, 240; *Norton v. Webb*, 35 Maine, 218.

Immediately after Mrs. Hayward left the premises and went away in December, 1882, Mary J. Tracy took possession of the premises, continued it for a year rented to Bowie and received all the rents and profits to her own use. There was evidence going to show, that the abandonment by Mrs. Hayward and the occupation by Mary J. Tracy, were simultaneous, and by an understanding to that end; and there was evidence going to show to the contrary. However the fact may be, when she did return to the possession and receive the rents and profits to her own use, it was, it is claimed, a waiver of all breaches up to that time,

and no claim can be maintained for breach before that date, by reason of such waiver, and none since, without showing a claim upon Hayward's administrator and refusal by him. *Farnum v. Bartlett*, 52 Maine, 575; *Bryant v. Erskine*, 55 Maine, 153; *Thayer v. Richards*, 19 Pick. 398; *Jenkins v. Stetson*, 9 Allen, 128; Jones on Mortgages, § 391, vol. 1, p. 290.

Bowie entered under a license and permission from Mrs. Tracy. A person entering under the license or permission of a party in possession, is not a disseizor and cannot be treated as such. *Brookings v. Woodin*, 74 Maine, 222.

FOSTER, J. This case comes before us upon exceptions to the refusals of the presiding justice to give certain requested instructions, and to certain instructions given.

The action is a writ of entry, brought for the purpose of foreclosing a mortgage which had been given to the deceased mortgagee to secure a bond for the support of himself and his wife during their natural lives. The mortgagee died. His interest and title vested as assets in his administrator. The plaintiff, as administrator of the deceased mortgagee, was the proper party to any proceedings for the foreclosure of that mortgage. When a mortgagee is dead, the process for foreclosure must be in the name of his executor or administrator, and the same proceedings for that purpose may be had by such executor or administrator, declaring on the seizin of the deceased, as the deceased mortgagee might have had if living. R. S., c. 90, §§ 11, 12.

Several of the questions which have been discussed are not before us. The only consideration which can be given by this court to questions arising in this case, must be in relation to those which are brought before it by the bill of exceptions. It would not be proper for this court, sitting as a court of law, to go outside of the exceptions and pass upon matters which were settled by the evidence presented to the jury, and to which no objection appears to have been raised at the trial. Whether the defendants were or were not properly joined in the suit as joint disseizors, or whether the description of the premises demanded

was such as the law requires, is presumed to have been decided correctly in accordance with the evidence and upon proper instructions in regard to the law from the court, inasmuch as neither of those questions is presented by the bill of exceptions. The case is not before us on report of the evidence upon which to settle the legal rights of the parties, and therefore our attention must be confined to questions raised by the exceptions.

I. The court properly declined to give the first requested instruction, — which was in substance, that in order for the plaintiff to recover it must be shown that there had been a breach of the bond during the lifetime of Abel Tracy, the deceased mortgagee. The instructions given, however, by the court were, that a breach of the bond must be shown, but that such a breach need not be shown to have occurred during the lifetime of the husband; that if there had been a breach since his death, and before the commencement of this suit, it would be sufficient to entitle the plaintiff to maintain this action.

The instructions given were correct. The mortgage was given as security for a bond for the support not only of the deceased mortgagee, but of his wife also, and was for their natural lives. This would constitute an obligation continuing as long as either lives. *Pike v. Collins*, 33 Maine, 43; *Merrill v. Bickford*, 65 Maine, 119. The bond and mortgage remained in force after the decease of the husband for the benefit of the widow, and as security for her maintenance during her life. There may have been a breach of condition in the lifetime of the husband, or there may have been none until after his decease.

The instructions given were in accordance with the rule of law laid down in *Marsh v. Austin*, 1 Allen, 235, in which the court hold that the administrator of the mortgagee, in a mortgage given to secure an agreement for the support of the mortgagee and his wife during their lives, is entitled to foreclose the mortgage for breach of condition accruing both before and after the mortgagee's death, although the mortgagee's widow is living and does not join in the suit.

II. The next requested instruction was that the plaintiff would not be entitled to maintain this action without showing that the

widow had made a claim upon the administrator of the deceased mortgagor for her support out of the mortgaged estate before the commencement of this suit.

The services to be performed in the support of the mortgagee and his wife were personal. It nowhere appears, either in the bond or mortgage, that they were to be rendered by any other than the mortgagor or his personal representatives. Such being the fact, it has been held that a personal trust is reposed in the mortgagor, and that the obligation which he assumes is such that he can not assign the duty over to third persons, substituting them in his place without the consent of those to whom the services are to be rendered. *Clinton v. Fly*, 10 Maine, 292; *Bryant v. Erskine*, 55 Maine, 156; *Eastman v. Batchelder*, 36 N. H. 141. Therefore, upon the decease of the mortgagor, the conditions must be kept by his heirs, executors, or administrators. It is a duty devolving upon them by express contract, and, to save any breach of the conditions of the bond, must be performed by those obliged by law to fulfill those conditions. This duty is not made conditional or dependant upon any claim or demand on the part of the widow of the mortgagee for her support. It was equally incumbent upon them to see that the conditions of the bond were fully performed in respect to her as when both were living. Therefore the requested instruction could not properly have been given.

III. The defendants' last request cannot be sustained, and the court was correct in declining to give it to the jury. The gist of this request was, that the widow, by virtue of her right to unassigned dower in the mortgaged premises, had the right to lease to one of the defendants such an estate in the demanded premises that he would not be a disseizor as against this administrator of the deceased mortgagee. It is not intimated by the pleadings that this defendant sets up any rights under the widow as tenant or otherwise, nor is it pretended that the widow has ever had her dower assigned; and not being assigned she could not, as against this plaintiff, claim to occupy any part of the estate. *Bolster v. Cushman*, 34 Maine, 428; *Wyman v. Richardson*, 62 Maine, 295; *Clarke v. Hilton*, 75 Maine, 432.

Having no legal estate in the premises which she could convey at that time, the defendant could derive none from her. The estate and title, as we have stated, at the decease of the mortgagee vested in the administrator of his estate as assets of the deceased (*Crooker v. Jewell*, 31 Maine, 313), which it is his duty to protect and enforce. *Felch v. Hooper*, 20 Maine, 163.

The plaintiff elected to treat the defendant Bowie as a disseizor, and as the requested instructions presented no legal claim of the defendant against the plaintiff's right of possession, (*Gregory v. Tozier*, 24 Maine, 308) the defendant was not injured by their being refused.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

MARTHA P. CHASE, Administratrix,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Sagadahoc. Opinion September 20, 1886.

Railroads. Contributory negligence. Farm crossing.

It is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is obstructed he must listen carefully; and to do this when riding with bells attached to his team, he must stop his horse.

Whether a railroad company is under an obligation to signal the approach of trains at a farm crossing, when used by the employees of an ice company in prosecuting its business, the court express no opinion.

On exceptions and motion to set aside the verdict.

An action by the administratrix of Edwin F. Chase for personal injuries received while crossing the defendant's railroad at a private crossing in Richmond, February 24, 1882.

The case has once before been considered by the law court and is reported in 77 Maine, 62.

It appeared by the evidence introduced at the trial, that before the location of the railroad, one Blanchard lived on the farm near the river, and had an ordinary farm way from his house to

78	346
87	351
87	548
78	346
89	344
78	346
96	215

the highway ; that when the defendant's railroad was constructed in 1850, it crossed this farm between the highway and the house, crossing this private way ; that the railroad was fenced on both sides, with gates on this way in both fences ; that the way was used only as a farm way, and the crossing only as a farm crossing down to 1870 ; in 1880, Kidder, the owner of the farm, sold land below the railroad to the Knickerbocker Ice Company, and granted them the right to use the way, from the highway to the land sold, crossing the railroad, for themselves, their workmen, and all persons having business to transact with them ; that in the winter of 1882, Kidder, at the request of the ice company, took down the gates ; that the plaintiff's intestate was at work for the ice company, and was on the way to the river to work for them when the accident happened. The defendant contended that said Edwin F. Chase, at the time he received the alleged injury, was not, as against the defendant, in the rightful use of the way.

The verdict was for the plaintiff in the sum of three thousand seven hundred and seventy-five dollars, and the defendant moved to set this aside as being against evidence and because the damages were excessive. The defendant also alleged exceptions to certain instructions of the presiding justice.

J. W. Spaulding and F. J. Buker, for the plaintiff.

This is not a case of right of way by adverse user for a particular purpose, or by grant for specific use, as in *Parks v. Bishop*, 120 Mass. 340 ; *Atwater v. Bodfish*, 11 Gray, 150.

It is a general right of way to the land east of the railroad, though used only for special purpose for farm from 1853 to 1870. Then for farm and ice purposes. *Holt v. Sargent*, 15 Gray, 102.

The cases are numerous where damages have been recovered for injuries at private crossing, and in some instances by those not entitled of right to use the crossing. *Murphy v. B. & A. R. R. Co.* 133 Mass. 121 ; *Sweeny v. O. C. & C. R. R. Co.* 10 Allen, 372 ; *Randall v. Conn. River R. R. Co.* 132 Mass. 269 ; *Barry v. N. Y. C. & C. Railroad Co.* 13 Am. & Eng.

R. R. Cas. 615; (92 N. Y. 380); *Thomas v. Delaware, &c. R. R. Co.* 12 Reporter, 739; (8 Fed. Rep. 728); *O'Connor v. B. & L. Railroad Co.* 135 Mass. 362; (15 American and English, 362).

The doctrine contended for by the defendant is against public policy, as well as against the policy of this defendant itself. It has been applauded by all our citizens, with reason, too, for its efforts in aid and encouragement of the slumbering industries of the state; in every instance it has offered and afforded accommodation and conveniences for those engaged in building up and carrying on business enterprises contiguous to its road. In this case, it built a little station close by these Knickerbocker Ice Houses and Haynes & DeWitt Ice Company's houses, for the convenience of these two ice companies in carrying their agents and employees back and forth.

This road leading across the railroad is for the convenience of Knickerbocker Ice Company, and no one else. It is the only route for teams from the public ways to its premises. If the Railroad Company can stop their crossing, then it can stop the business, for there is no public convenience and necessity for the way. But we say again that the defendant is not aggrieved at this ruling. The evidence all the way along shows a license to the Knickerbocker Ice Company and their employees to use a crossing, and this is the only one they could use. They could not use either of the other two in the vicinity without trespassing on other land owners. The building of the station shows in the most emphatic manner the expression of a wish on the part of the railroad company to promote the ice business there, and it must be held to have knowledge of the fact that the business could not be carried on without employing large numbers of teams which could only reach the premises by this crossing. Many of the employees went back and forth on the trains every day, and sometimes whole carloads of men were brought. There is no difficulty in finding the license nor the manner in which the railroad company was compensated for it.

The questions of negligence of the defendant and contributory negligence of the plaintiff were for the jury. *Webb v. P. & A.*

R. R. Co. 57 Maine, 117; *Larrabee v. Sewall*, 66 Maine, 376; *Com. v. R. R. Co.* 126 Mass. 69; *Hinckley v. R. R. Co.* 120 Mass. 264; *Eaton v. R. R. Co.* 129 Mass. 364; *O'Connor v. R. R. Co.* 135 Mass. 352; *Copley v. R. R. Co.* 136 Mass. 6; *Tyler v. R. R. Co.* 137 Mass. 238; *R. R. Co. v. Van Steinburg*, 17 Mich. 99; *R. R. Co. v. Stout*, 17 Wall. 657; *R. R. Co. v. McElwee*, 67 Pa. St. 311; *Salter v. R. R. Co.* 88 N. Y. 42 (8 Am. & Eng. R. Cas. 437,); *Dobiecka v. Sharp*, 88 N. Y. 203 (8 Am. & Eng. R. Cas. 485,); *Barry v. R. R. Co.* 92 N. Y. 289 (13 Am. & Eng. R. Cas. 615,); *Nehrbas v. R. R. Co.* 14 Am. & Eng. R. Cas. 670, (Cal.); *R. R. Co. v. Com.* 13 Bush. 388 (26 Am. R. 205, note,); *R. R. Co. v. Fitzsimmons*, 22 Kans. 686 (31 Am. R. 203, note,); *Railroad Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134,); *Bradley v. Boston & Maine Railroad*, 2 Cush. 539; *Linfild v. R. R. Co.* 10 Cush. 569; *Com. v. Railroad Co.* 101 Mass. 202; *Bailey v. New Haven, &c. Co.* 107 Mass. 497; *Norton v. Eastern Railroad Co.* 113 Mass. 369; *Eaton v. Fitchburg Railroad Co.* 129 Mass. 365; *Lesan v. Maine Cen. Railroad Co.* 77 Maine, 85.

Drummond and Drummond, for the defendant.

The railroad took this land for their roadway, subject, at most, to the incumbrance of the farm crossing, and were bound to pay, and the presumption is, *did* pay damages accordingly. Considering the nature of the use to which the company must put the land, the damages for taking it would be diminished by the easements to which it should be subjected; and there is a vast difference between an easement for a farm crossing and an easement for a way upon which, as was claimed at the trial, there is more travel than upon the majority of the highways in the town. The imposition of a greater easement is the basis of the company's right to damages for laying out a way over it. That the easement of a railroad in its road-bed is property, for the taking of which, or the encumbering of which by laying out a way over it, the company is entitled to damages, under the Constitution, is now well settled. *Old Colony, &c., Railroad Co. v. County of Plymouth*, 14 Gray, 155. This decision was

affirmed in *Grand Junction R. & D. Co. v. Middlesex*, 14 Gray, 553. This principle has been fully recognized by the legislation of this state. Chapter 223 of Laws of 1880.

"The interest of a railroad company in its location, although technically an easement, is not limited to an ordinary right of way, such as is acquired for highways, but it justifies a use of the land for all the purposes of a railroad. Its possession, except at crossings established by law, is permanent in its nature, and practically exclusive, such possession being essential to a safe and effective working of its machinery." *Pierce on Railroads*, p. 159.

"The landowner, where a right of way is not reserved by agreement, or fixed by statute, has no right to cross a location which has divided his land." *Pierce on Railroads*, pp. 160, 161.

In *Mason v. Kennebec & Portland Railroad Co.* 31 Maine, 215, it is held that a railroad company has the right to build an embankment for their road-bed across land so as to prevent communication between the two parts thus separated.

"The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land, permanent in its nature, and practically exclusive." *Hazen v. Boston & Maine Railroad*, 2 Gray, 574, 580.

It is settled law that the taking of land for a railroad deprives the owner of all rights in the land, the exercise of which would interfere with the safe and convenient operation of the railroad. *Brainard v. Clapp*, 10 Cush. 6; *Curtis v. Eastern Railroad Co.* 14 Allen, 55, 58; see *Boston Gas Light Co. v. Old Colony & Newport Railroad Co.* 14 Allen, 444.

"As the railroad company would have the right to take the land for the purposes of their road, if the fee, instead of the easement had belonged to the plaintiffs, it must follow, either that there is no right to destroy, by a railroad, the liberty which an owner has of passing over his land from one part of it to the other, in common with other modes of occupying and using it; or that the law has given some peculiar protection to the right to pass over the land of another, which it does not give to the right of passing over one's own land."

In this case, the case *Boston & Worcester Railroad Co. v. Old Colony Railroad Co.* 12 Cush. 605, was substantially overruled.

In *Clark v. The B. C. & M. Railroad Co.* 24 N. H. 114, it was held that a man can not have a "private way," in the statute sense, over his own land, and that the term "private way" in the statute refers to private ways laid out under the provisions of the statute.

In *March v. P. & C. Railroad Co.* 19 N. H. 378, it was suggested that such a way as a farmer has over his farm may be a "private way" within the meaning of the railroad laws, and, therefore, that a landowner was entitled to have suitable crossings made for his use. But this suggestion was expressly overruled in the case last cited, as well as anything looking in the same direction in *Dean v. Sullivan Railroad Co.* 22 N. H. 316. See *Horne v. Atlantic & St. Lawrence Railway Co.* 36 N. H. 440; *Conn. and Pass. Rivers Railroad Co. v. Hilton*, 32 Vermont, 43.

In *Troy & Boston Railroad Co. v. Potter*, 42 Vermont, 265, the preceding case was cited and approved.

In a case (*Ham v. Salem*, 100 Mass. 350) involving the same principle, the court says: "The company may reserve to the owner such rights of way or other rights as they deem proper; and the record will show that they are reserved. Such reservations may diminish his claim for damages. But no rights not thus reserved will exist." See *Presbrey v. O. C. & N. Railroad Co.* 103 Mass. 1; *Proprietors of Locks and Canals v. N. & L. Railroad Co.* 104 Mass. 1; *Old Colony Railroad Co. v. Miller*, 125 Mass. 1; *Drury v. Midland Railroad*, 127 Mass. 571; *Murphy v. Boston & Alb. Railroad*, 133 Mass. 121.

On the question of negligence counsel cited: *L. S. & M. S. Railroad Co.* 25 Mich. 274; *Wheelock v. B. & A. Railroad Co.* 105 Mass. 203; *Todd v. Railroad Co.* 3 Allen, 18; *Gahagan v. Railroad Co.* 1 Allen, 187; *Todd v. Railroad Co.* 7 Allen, 207; *Butterfield v. Railroad Co.* 10 Allen, 532; *Lucas v. Railroad Co.* 6 Gray, 64; *Gavett v. Railroad Co.* 16 Gray, 506; *Nichols v. Railroad Co.* 106 Mass, 463;

Harvey v. Railroad Co. 116 Mass. 269; *Grows v. Railroad Co.* 67 Maine, 100; *Kellogg v. Curtis*, 65 Maine, 59.

The plaintiff failed to prove that her intestate was in the exercise of ordinary care. It follows that if there is no proof on this point, or the proof is not sufficient, the action must fail. *Brown v. E. & N. A. Railway Co.* 58 Maine, 384; *Merrill v. Hampden*, 26 Maine, 234; *Dickey v. The Maine Telegraph Co.* 43 Maine, 492; *Grows v. Maine Central Railroad Co.* 67 Maine, 109; *Same v. Same*, 69 Maine, 412; *Plummer v. The Eastern Railroad Co.* 73 Maine, 591; *Pierce on Railroads*, page 298.

Among the Massachusetts cases to the same point are *Lane v. Crombie*, 12 Pick. 177; *Lucas v. N. B. & T. Railroad Co.* 6 Gray, 64; *Robinson v. F. & W. Railroad Co.* 7 Gray, 92; *Gahagan v. B. & L. Railroad Co.* 1 Allen, 187; *Warren v. Fitchburg Railroad Co.* 8 Allen, 227, 230; *Butterfield v. Western Railroad Co.* 10 Allen, 532; *Gavett v. M. & L. Railroad Co.* 16 Gray, 501; *Wilson v. Charleston*, 8 Allen, 137; *Murphy v. Deane*, 101 Mass. 455; *Chaffee v. B. & L. Railroad Co.* 104 Mass. 108; *Mayo v. B. & M. Railroad Co.* 104 Mass. 137; *Allyn v. B. & A. Railroad*, 105 Mass. 77; *Wheelock v. B. & A. Railroad*, 105 Mass. 203; *Crafts v. Boston*, 109 Mass. 519; *Prentiss v. Boston*, 112 Mass. 43; *French v. T. B. Railroad Co.* 116 Mass. 537; *Craig v. N. Y. & N. H. Railroad Co.* 118 Mass. 431; *Hinckley v. C. C. Railroad Co.* 120 Mass. 257; *Hickey v. B. & L. Railroad Co.* 14 Allen, 429; *Com. v. B. & L. Railroad*, 126 Mass. 61; *Com. v. B. & M. Railroad*, 129 Mass. 500.

The same rule exists in New York, 75 N. Y. 330.

According to the text books, the rule established in this State, as to the burden of proof, also prevails in Connecticut, Illinois, Indiana, Iowa, Massachusetts, Michigan, Mississippi, Georgia, Louisiana, North Carolina, Oregon and New York; and the opposite rule prevails in Alabama, California, Kentucky, Maryland, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, Wisconsin, and perhaps in Rhode Island and Texas.

In several of the latter States, however, the rule is expressly established by statute.

One author (favoring the latter rule) puts New Hampshire in the same list, citing 30 N. H., 188, and 35 N. H., 356. The cases do not sustain him, and repeated decisions affirm the rule prevailing in Maine. See 41 N. H. 44, 135, 317; *Liston v. Lyman*, 49 N. H. 566, and cases cited; *State v. Railroad*, 52 N. H. 528, 537, 550.

WALTON, J. We think the verdict in this case is clearly wrong. The rule is now firmly established in this State, as well as by courts generally, that it is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is unobstructed, he may have no occasion to listen. But if his view is obstructed, then it is his duty to listen, and to listen carefully. And if one is injured at a railroad crossing by a passing train or locomotive, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence; and if this presumption is not repelled, a recovery for the injury can not be had. These rules have been so recently and so fully considered by this court, that we refrain from discussing them further. It is sufficient to say that they are now the settled law of this State. *Lesan v. Railroad*, 77 Maine, 85; *State v. Railroad*, 77 Maine, 538; *State v. Railroad*, 76 Maine, 357.

The evidence in this case shows that the crossing where the deceased was injured was in one particular peculiarly dangerous. It was at the northerly end of a cut, and between the cut and the road leading westerly from the crossing, were high land and other obstacles, which would prevent one approaching from the west from seeing a train coming from the south for a considerable distance before reaching the crossing. This would make it the traveler's duty to listen, and to listen carefully and attentively. To do this, if riding in a sleigh, and especially if riding in a sleigh with bells attached, it would be necessary to stop his horse. For surely he could not listen carefully and effectually

without stopping his horse, and thus stilling the noise of his own team. And yet the deceased did not observe this caution. The evidence shows that he approached the crossing where he was injured, in a sleigh, with bells attached, his horse trotting. He did not stop his horse—he did not even reduce the speed of his horse to a walk. The result was such as might reasonably have been apprehended. Just as his horse's head reached the crossing, a train of cars which had been concealed from his view shot out of the cut and on to the crossing directly in front of him. When the train had passed, he was found lying within a few feet of the track, and, if not wholly unconscious, so badly injured that he was unable to speak, and he died within half an hour. Just how he was struck does not appear. The tracks of his horse and of his sleigh indicate that when the train shot on to the crossing in front of him, his horse turned quickly to the left, and that the momentum of the sleigh caused it to tip toward the track, and that the deceased was thrown out and fell so near to the track that some part of the passing train struck him and inflicted the injuries of which he died. Neither the horse nor the sleigh was struck,—at least no injuries were found upon either. But the driver was found, after the train had passed, fatally injured, as already stated. We can not doubt that if the deceased had stopped his horse at a proper distance from the crossing, so as to still the noise of his own team, and had then listened, he would have become aware of the near approach of the train, and the accident would have been avoided. He did not do so. We think the omission was negligence—contributory negligence,—and that an action for the injury can not be maintained.

Having come to a conclusion favorable to the railroad upon the motion to set aside the verdict, it is unnecessary to consider the questions raised by the exceptions. But perhaps we ought to add that the counsel for the railroad contend strenuously that the road has been guilty of no wrong; that the crossing where this accident happened was a mere farm crossing; that the deceased in attempting to use it was a trespasser; and that the railroad was under no obligation to signal the approach of its trains to this crossing by either bell or whistle, and especially

that it owed no such duty to the deceased. But upon this branch of the case we express no opinion.

The motion is sustained, and the verdict set aside.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.

THOMAS R. CATLAND, Executor, vs. FRANK L. HOYT.

Androscoggin. Opinion September 20, 1886.

Contract. Life insurance. Evidence. Executors and administrators. Action.

C obtained a certificate of life insurance from the United Order of the Golden Cross, which provided that the sum insured should be paid to H at C's death. That was done. *Held*, in an action by C's executor against H, that evidence was admissible to prove the defendant promised C, that, after deducting whatever sum might be due him from C, at C's death, from the insurance money, he would pay the balance over to C's heirs. *Held further*, that C's executor was the proper party to bring suit on such a promise.

ON EXCEPTIONS and motion to set aside the verdict.

Assumpsit by the executor of the last will of David B. Catland, deceased, to recover money received by defendant on a benefit policy of life insurance on the life of said David. The opinion states the case and material facts.

F. M. Drew, for the plaintiff, cited, on the admissibility of the evidence: 1 Greenl. Ev. (13 ed.) § 284, a; *Dearborn v. Parks*, 5 Greenl. 81; *Burbank v. Gould*, 15 Maine, 120; *Schillinger v. McCann*, 6 Greenl. 364; *Tyler v. Carlton*, 7 Greenl. 175; *Emmons v. Littlefield*, 13 Maine, 233; *Nickerson v. Saunders*, 36 Maine, 413; *Goodspeed v. Fuller*, 46 Maine, 149; *Bonney v. Morrill*, 57 Maine, 368; *Dearborn v. Morse*, 59 Maine, 210; *Farrar v. Smith*, 64 Maine, 74.

The action is properly brought in the name of the executor. 1 Chitty, Contracts, (11 ed.) 74, note; 2 Greenl. Ev. § 109; *Bohanan v. Pope*, 42 Maine, 96; *Metcalf*, Contracts, 211; 1 Waits' Actions and Defences, Art. 5, § 1, and cases cited; *Lawes*, Pl. in Assumpsit, 88; *Martin v. Aetna Ins. Co.* 73 Maine, 28; *Dacey on Parties*, 222, 224; *McLean v. Weeks*, 61

Maine, 280; *Fletcher v. Holmes*, 40 Maine, 367; *Steele v. Aylesworth*, 18 Conn. 244; *Sanford v. Hayes*, 19 Conn. 594.

Money had and received can be maintained. *Hall v. Marston*, 17 Mass. 579; *Camp v. Tompkins*, 9 Conn. 554; *Howe v. Clancey*, 53 Maine, 130.

The verdict should not be set aside. *Milo v. Gardiner*, 41 Maine, 551; *Glidden v. Dunlap*, 28 Maine, 382; *Handey v. Call*, 30 Maine, 17; *West Gardiner v. Farmingdale*, 36 Maine, 254; *Bryant v. Glidden*, 39 Maine, 464; *Enfield v. Buswell*, 62 Maine, 128; *Weeks v. Parsonsfield*, 65 Maine, 286.

George C. and Charles E. Wing, for the defendant.

The contract between the parties was under seal, fulfilled after the death of the testator, recognized as binding by all persons, and it is admitted that the defendant rightfully received the money paid upon it. There is no declaration upon any contract made by the defendant with the testator concerning the insurance, or the distribution of any funds that might be paid under the contract, and we submit that testimony concerning a contract not declared upon, should have been excluded. That Mr. Catland, Senior, regarded the transaction as an absolute one, is much more satisfactorily shown by the circumstances in the case than in any ordinary view demonstrated by the testimony of his son, the executor.

First, it is a fact and one that can not be varied by verbal testimony, that during the entire continuance of this certificate the testator had it in his power to change the name of the beneficiary upon the payment of fifty cents. If the plaintiff's version of the case were true, would he not have done so and left it for any new beneficiary that he had last named to adjust the business with Hoyt? If this were not so, would he have tried to induce his son and his son-in-law, one or both of them, to have assumed the contract of insurance and become the beneficiary?

That the verdict is excessive in amount, if the plaintiff were entitled to any at all, is demonstrated conclusively by simply adding its amount, \$1239.43, to the items amounting to \$762.08,

which sum is made up without interest or charges except for actual cash disbursements, and we find the sum of \$2001.51, or \$41.91 more than the defendant received from the society on the certificate. This position requires no argument, and for this reason, if for none other, the verdict should be set aside and an opportunity presented for this wrong to be righted and justice done to the defendant.

Defendant cites Greenleaf on Evidence, Vol. 1, § 87; *Shaw v. Shaw*, 50 Maine, 94; *Currier v. Continental Life Insurance Co.* 52 American Reports, (note control of policy by insured.

WALTON, J. It appears by the report in this case that David B. Catland obtained from the United Order of the Golden Cross a certificate in the nature of a life insurance policy, by the terms of which the money that should become due upon it was to be paid to the defendant, and that the defendant, after the decease of Catland, actually received upon it the sum of \$1959.60. The plaintiff, who is the executor of David B. Catland, claims, and, at the trial, offered evidence tending to prove, an oral agreement between the defendant and the deceased, by the terms of which the defendant promised that, after deducting what should be due from the deceased to him, he would pay the balance to the heirs of the deceased. The defendant objected to this evidence upon the ground that it tended to vary the terms of the written agreement between the deceased and the insurance company; and further, that the evidence, if admitted, would show a promise by the defendant to pay, not to the deceased, but to his heirs, and that such a promise would not support an action by the executor. These objections were overruled and the plaintiff obtained a verdict for \$1239.91. The defendant excepts to the ruling, and moves for a new trial on the ground that the verdict is excessive and against the weight of evidence. It is the opinion of the court that the ruling was correct and that the verdict was justified by the evidence. The oral evidence was not in conflict with the written contract. It was offered, not to vary or control the contract between the deceased and the insurance company, but

to show another and an independent contract between the deceased and the defendant. It was offered, not to show that the defendant was not to receive the money, but to show what he was to do with it after receiving it. For this purpose the evidence was clearly admissible. And as the latter agreement, if made at all, was made with the deceased, his executor is a proper party to sue for the breach of it. It is true that by the terms of this agreement, the defendant promised to pay the money to the heirs of the deceased. But the contract was not with the heirs; it was with the deceased; and not having been performed, the executor was a proper party to sue. There is a conflict in the authorities as to whether, when a contract is made with A to pay money to B, B may maintain an action for the breach of it. But there is no doubt that for the breach of such a contract, A, or, in case of his death, his executor or administrator, is a proper party to sue, as the authorities cited by the plaintiff's counsel abundantly show.

Motion and exceptions overruled.

Judgment on the verdict.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

NATHANIEL F. CLAPP vs. ELIJAH MANTER.

Somerset. Opinion September 20, 1886.

Mills and mill-dams. Flowage. Drift-stuff.

The complaint for flowage under the mill act only lies where the flowage is caused by a head of water designedly raised for the purpose of working a mill. Such a complaint can not be sustained by flowage caused by a head of water accidentally raised by a jam of drift-stuff and applied to no useful purpose.

ON motion and exceptions.

Complaint for flowage. The verdict was for the plaintiff, and the defendant moved to set it aside as being against law and evidence and the weight of evidence. The defendant also alleged exceptions to certain instructions of the presiding justice.

The facts are sufficiently stated in the opinion.

J. J. Parlin, for the plaintiff.

This is the proper form of action. R. S., c. 92, § 4. In *Monmouth v. Gardiner*, 35 Maine, 253, the court says: "In cases for flowing lands by mill owners, the remedy for the proprietor of the land is provided by the statute and an action at common law can not be maintained. *Stowell v. Flagg*, 11 Mass. 364; *Dingley v. Gardiner*, 73 Maine, 65; *Gordon v. Saxonville Mills*, 14 Allen, 220; *Turner v. Whitehouse*, 68 Maine, 222; *Inhabitants of Calais v. Dyer*, 7 Maine, 155; 10 Metcalf, 203; *Crosby v. Bessey*, 49 Maine, 543; 16 Pick. 241; *Augusta v. Moulton*, 75 Maine, 284.

Suit is properly brought as the fee is in the plaintiff, 7 Maine, 155, above cited. *Williams v. Carlton*, 53 Maine, 449.

Damages can be legally and properly settled in this case. *Munroe v. Stickney*, 48 Maine, 462; *Turner v. Whitehouse*, 68 Maine, 223; *Bean v. Hinman*, 33 Maine, 480; *Clark v. Rockland Water Power Co.* 52 Maine, 81.

No matter whether the water is stopped by the dam, flash boards, or drift-wood, the injury to complainant is the same, and none the less in one case than in the other. The same remedy for redress is open in one case as in the other, and is by this form of action. 73 Maine, 65, above cited; 14 Allen, 220, *supra*.

The verdict is not against evidence or the weight of evidence, nor is it against the law. And it will not be set aside. *Enfield v. Buswell*, 62 Maine, 128; *Hunter v. Heath*, 67 Maine, 507; *Staples v. Wellington*, 58 Maine, 453.

Walton and Walton, for the defendant, cited: *Hill v. Sayles*, 12 Met. 142; *Farrington v. Blish*, 14 Maine, 423; *Jones v. Skinner*, 61 Maine, 28; *Crockett v. Millett*, 65 Maine, 191; *Baird v. Hunter*, 12 Pick. 555; *Fiske v. Framingham Man. Co.* 12 Pick. 67; *Hodges v. Hodges*, 5 Met. 205; *Thompson v. Moore*, 2 Allen, 350; Gould, Waters, 764, 765, and notes; *Rich v. Kershner*, 56 Wis. 287; *Dixon v. Eaton*, 68 Maine, 542; *Wilson v. Campbell*, 76 Maine, 94; *Palmer Co. v. Ferrill*, 17 Pick. 65; *French v. B. Man'g Co.* 23

Pick. 220; *Eames v. N. E. Worsted Co.* 11 Met. 571; *Murdock v. Stickney*, 8 Cush. 117.

WALTON, J. This is a complaint for flowage; and the question is whether, under the circumstances disclosed at the trial, it can be maintained.

It appeared that the defendant had acquired a right to flow the plaintiff's land from the first of October to the twentieth of May in each year, without the payment of damage, and that it was his custom during the remainder of the year to stop working his mill and leave his gates open and allow the water to pass off freely. He did so in 1883. But between the twentieth of May and the first of October of that year, large quantities of drift stuff came down from a mill above and from other sources, and formed a jam in front of the defendant's gates sufficiently obstructive, during severe rains, to cause the water to flow back upon the plaintiff's land.

The question is whether flowage thus caused will sustain a complaint under our mill act.

We think it will not. Such a complaint is a special remedy, and lies only when the flowage is lawful, and such as the mill act itself authorizes. That is, the flowage must be caused by a head of water designedly raised for the purpose of working a mill. A head of water raised accidentally by a jam of drift stuff, and applied to no useful purpose, is not the kind of flowage contemplated by the mill act, and for which the special remedy by complaint is provided. Under such a complaint commissioners are to be appointed, and they are to view the premises and determine how far it may be necessary to flow the complainant's land, and for what portions of the year, and appraise the yearly damage, past and future. Surely such proceedings are not intended for a casual, accidental, flowing; one not intended and presumably not to be continued. For such a wrong an action at law is the proper remedy.

Thus, where the defendant's right to flow was limited to certain months in each year, and he kept his gates closed and flowed the plaintiff's lands at other times, the court held that an action

at law was the proper remedy, and not a complaint under the mill act. *Hill v. Sayles*, 12 Met. 142.

So, where a mill had been removed in October, but the dam remained till the following June, the court held that an action at law, and not a complaint under the statute, was the proper remedy for the flowing between October and June. *Baird v. Hunter*, 12 Pick. 556; and see *Fiske v. Framingham Man'g Co.* 12 Pick. 68.

And, in this State, where a mill-dam overflowed a town road, the court held that the flowage was not authorized by the mill act, and, consequently, that a complaint under that statute could not be maintained,—that the proper remedy, if any, was an action at law. *Calais v. Dyer*, 7 Maine, 155. And in a later case, for a similar injury, an action at law was sustained. *Monmouth v. Gardiner*, 35 Maine, 247. And see *Strout v. Mill-bridge Co.* 45 Maine, 76.

The principle running through all the cases, not only those cited, but many others, is that, when the flowage is lawful, and in all respects such as the mill act authorizes, a complaint under the statute is the proper remedy; but when the flowage is for any cause unlawful, redress must be sought in some other form,—generally by an action at law, but sometimes by a bill in equity.

In this case, the flowage was caused by drift stuff unlawfully thrown into the river, or negligently allowed to float in. It may be true—and undoubtedly is true—that the drift stuff would not have formed a jam sufficiently tight to stop the water but for the defendant's dam. Still, it was the drift stuff that stopped the water and caused the flowage. The flowage was not caused by a head of water designedly raised for working a mill, and was not, therefore, within the protection of the statute, and a complaint under the statute was not a proper remedy by which to recover the damage done by it.

Motion sustained. New trial granted.

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY, EMERY and FOSTER, JJ., concurred.

JOSEPH B. PEAKS vs. JAMES A. GIFFORD and another.

Piscataquis. Opinion September 24, 1886.

Levy. Officer's return. Amendment. Description.

Where the return of a levy shows that the officer actually gave notice to the debtor after the seizure and before the choice of an appraiser, and the debtor refused to choose an appraiser, that is sufficient, without any date, to show that the officer had done all that was required in that respect.

Such a return is a sufficient notice to a subsequent *bona fide* purchaser to authorize an amendment, where the return erroneously stated that the notice was given the debtor in "1876" when it was in fact given in "1879."

Where the return shows that an undivided half of the lot specified was set off, the statement that it was set off by "metes and bounds" can have no effect.

ON REPORT.

Petition for partition dated August 5, 1885, in which the petitioner alleges that he is the owner of one-half of Lot No. 8, Strong's survey, in the town of Milo; that James A. Gifford of Milo was the owner of the other half, and that the estate ought to be divided.

The defence was that William R. Gifford was the owner of the part claimed by the petitioner, and, by leave of court, he appeared and defended as to that part.

The material facts are stated in the opinion.

J. B. Peaks, for the plaintiff.

Permission to amend a return ought not to be given as a matter of course, nor granted without notifying the adverse party and giving him an opportunity to show cause against the amendment. Freeman on Ex'ors, § 358; *Chase v. Williams*, 71 Maine, 197.

Plaintiff says he took his deed, while the return of the officer showed a fact which made the levy absolutely void; and the officer should not now be allowed to amend his return, so as to change a statement of fact which would make a valid levy out of a void levy; the officer is bound by his return as to state-

ments of facts, and everybody interested is also bound by it. *Hobart v. Bennett*, 77 Maine, 401.

In *Knight v. Taylor*, 67 Maine, 591, the officer was allowed to amend his return by adding something which he had omitted to state, and the court cited several authorities holding that if there is in the record sufficient to show that all the requirements of the law have probably been complied with, the defect is amendable.

But in *Bessy v. Vose*, 73 Maine, 218, where the officer asked to amend a date, as he does here, the court say, on page 219, "Cases may occur where some fact, which the technical rule of law requires should affirmatively appear, may not be directly stated in the return, and still enough may appear to give third parties reasonable notice that the law in that respect was complied with," and cites, *Knight v. Taylor*, *supra*.

"But," say the court, "this is not a case of a failure of the officer to state a fact in his return; it is a case where the fact is affirmatively and positively stated." And the court held the officer bound by his return and disallowed the amendment.

A levy upon an undivided share and setting out by "metes and bounds" shows a want of understanding or heedlessness that is inconsistent with the requirements of a valid levy. *Chase v. Williams*, 71 Maine, 190.

The officer says it was set off in "fee simple." If so, how could it have been an undivided half?

In *Brackett v. Ridlon*, 54 Maine, 434, the court say: "A fee simple is the largest estate known to the law; and when this term is used, and no words of qualification or limitation are added, does it not necessarily imply an estate owned in severalty?"

So when a person owns in common with another, he does not own the entire fee, a "fee simple." It is a fee divided or shared by another. *Brackett v. Ridlon*, 54 Maine, 434; *Boynnton v. Grant*, 52 Maine, 220; *Stinson v. Rouse*, 52 Maine, 261.

The plaintiff relies upon the case of *Pendergrass v. York Man'f'g Co.* 76 Maine, 512, and cases there cited, where the court say that "a nonsuit is like blowing out a candle which a man may light again at his pleasure."

C. A. Everett, for the defendants, cited: R. S., c. 76 § 3; *Chase v. Williams*, 71 Maine, 190; *Fitch v. Tyler*, 34 Maine, 469.

DANFORTH, J. This is a petition for partition, which comes up on report. The only question involved is the title of the petitioner to the part claimed by him. One of the respondents claims the same part through mesne conveyances under a levy upon an execution against the petitioner's grantor. The petitioner's title is by deed subsequent to the levy. The question presented is the validity of the levy, to which two objections are made.

I. The levy was made in October, 1879. The officer in his return says that in October, 1876, he gave notice to the debtor, "to choose an appraiser, which he declined and refused to do." It is objected that this error in the date is a fatal one and cannot be amended, as this petitioner is a subsequent *bona fide* purchaser. It is true that as the petitioner is a *bona fide* purchaser as the case shows, such an amendment if necessary, could not be allowed, unless the facts bring the case within the well established principle laid down in *Glidden v. Philbrick*, 56 Maine, 224; *Knight v. Taylor*, 67 Maine, 591; *Chase v. Williams*, 71 Maine, 196, and many other cases. The principle is thus stated in *Glidden v. Philbrick*: "If the return contains sufficient matter to indicate that in making the extent, all the requisitions of the statute have been complied with, an amendment may be made, notwithstanding any intervening interest of a subsequent purchaser or creditor." This principle applies, as recognized in *Chase v. Williams, supra*, to mistakes as well as omissions. Nor does this view of it militate against the decision in *Bessey v. Vose*, 73 Maine, 217. The principle was recognized in that case, but the facts presented an entirely different question. There was in that case an affirmative statement of a material fact which did not exist, while there was no statement whatever of the fact which was intended, or any indication of its existence upon the record or otherwise. The officer in fact did what was not required, but failed to do what was required. If the amend-

ment asked for in that case had been allowed it might have expressed what the officer intended to do, but not what he did do. In this case the error to be corrected does not state what the officer did. He did not as a matter of fact notify the debtor in 1876, but he did give the notice in 1879. This is a mere clerical error, as is demonstrably proved by the record itself. The judgment upon which the execution issued was not recovered until September, 1879. It appears by the return that the seizure of the land was made October 15, 1879; the return is dated October 16, 1879; by that return it appears that the debtor was notified of the seizure and at the same time requested to select an appraiser, which he refused to do, and in consequence of such refusal the officer selected one who did act. Thus it fully appears that the date given is necessarily a mistake, and independent of it, that the officer had done all that was required of him. The date was not necessary. It is sufficient for the officer to give reasonable notice. It appears here that the notice was given after the seizure and before the selection of an appraiser by the officer; and that the time was reasonable appears from the refusal of the debtor to appoint. The officer was under no obligation to wait after that.

It is objected that before the amendment can be made, the case must be sent back for a hearing. That may be necessary when no other provision is made. But in this case it is provided in the report that if the amendment is allowable it shall be considered as made. This is sufficient authority for a disposition of the case the same as if the amendment was made.

II. The second objection is, that, though the debtor's interest was that of a tenant in common, from the description it appears to have been set off in severalty, or as better stated in the argument, "because the appraisers appraised an undivided half part and set it out by metes and bounds."

The statute, R. S., c. 76, § 3, provides that the appraisers shall "describe the land by metes and bounds, or in such other manner that it may be distinctly known and identified, whatever the nature of the estate may be." It is, therefore, not necessary to describe the premises by "metes and bounds;" any other

description by which they may be identified is sufficient. In this case the estate taken is described as a piece of real estate in Milo, "to wit: lot numbered eight, Strong's survey, containing one hundred and forty acres, one undivided half of which is owned by the said Millett (debtor) in common with other person or persons unknown to your appraisers," and "we have appraised said undivided half part in common owned by the said Millett of said lot No. 8, . . . and have set off the said undivided half part in common with metes and bounds to" the creditor.

Thus it appears plainly enough that the appraisers viewed, appraised and set off to the creditor just the interest which it is conceded the debtor had in the land; no more, no less. But it is objected that it was set off with "metes and bounds." But what harm does that do? If the objection is that they gave too much, or too large an interest, that would be an error of which the debtor or his grantee could not complain. The same interest was appraised as set off. It would still hold his interest. If it is claimed that it was an attempt to divide the interests of the tenants in common, where is the evidence of it? It does not appear where the bounds were, whether they included the whole lot or a part. The fair construction, almost the necessary one, is that it was intended to include the whole lot, which would accord with the other part of the description.

But a complete answer to the objection is that no bounds are referred to except the lot boundaries. No metes or bounds other than these are described or mentioned. It does not appear that the appraisers run any lines or put up any bounds, and if they did, such bounds or lines could not be descriptive of the land, unless referred to and described as such in the certificate. So that these words must be considered as unmeaning and without effect upon the description of the premises, which without them is complete and leaves no uncertainty as to the estate taken.

The officer adopts and follows the description of the appraisers in substance, adding that the debtor held the undivided part "in fee simple." This was an error which would correct itself. The

words do not and cannot be understood to change or qualify the fact before stated that the debtor owned an undivided half. There certainly can be no inference drawn from it that the appraisers actually divided the land. The largest meaning which can be given to the expression, taken with its connection, is that the debtor owned absolutely the undivided half.

Judgment for the respondents.

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

ANDERSON J. LYNN vs. CHARLES H. RICHARDSON and others.

Kennebec. Opinion September 23, 1886.

Equity. Mortgages. Surety.

Where the surety on a mortgage debt pays the same to the holder and receives the note and mortgage, without any assignment or discharge written thereon, he can not maintain a bill in equity against the owners of the equity of redemption, praying, that the mortgage "may be decreed to be still subsisting, that he may be subrogated to the rights of the mortgagee therein and may be empowered to foreclose the same according to law."

On report of bill in equity to which a general demurrer was filed.

The bill sets out that the plaintiff and defendant Richardson, bought certain real estate in Farmingdale, March 12, 1872, for one thousand dollars, of which each was to pay one-half; that the plaintiff paid his half and Richardson paid two hundred dollars on account of his half, and both joined in a note and mortgage to their grantor for balance, three hundred dollars, with the agreement that Richardson should pay it; that November 28, 1879, Richardson gave the other defendants a mortgage deed of one-half the premises, which mortgage is outstanding; that September 28, 1885, Richardson filed his petition in insolvency; that November 16, 1885, the plaintiff paid the Hallowell Savings Institution, which had become the owner, the amount due on the old mortgage given by him and Richardson, and the note and mortgage was delivered to him without being discharged or assigned to him. Other facts fully stated in the opinion.

H. M. Heath, for plaintiff.

The remedy sought is broad enough to include every instance in which one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. *Barker v. Parker*, 4 Pickering, 505; *Lewis v. Palmer*, 28 N. Y. 271.

Subrogation as a matter of right takes place for the benefit of a co-obligor or surety who has paid the debt which ought in whole or in part to have been paid by another. *Cottrell's App.* 23 Penn. St. 294; *Young v. Vough*, 23 N. J. Eq. 325; *Silk v. Eyre*, Irish Rep. 9 Eq. 393.

The remedy is applied only in favor of one who has been compelled to pay the debt of a third person in order to protect his own rights or save his own property. *Cole v. Malcolm*, 66 N. Y. 363; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Whithed v. Pillsbury*, 13 N. B. R. 241.

The course adopted in taking up the mortgage without discharge or cancellation was proper. See *Wall v. Mason*, 102 Mass, 316.

Where the money due upon a debt is paid, it will operate as a discharge of the indebtedness or in the nature of an assignment subrogating him who pays it in the place of the creditor as may best serve the purposes of justice and the just interests of the parties. *Robinson v. Leavitt*, 7 N. H. 99; *Russell v. Austin*, 1 Paige Ch. (N. Y.) 192; *Peltz v. Clarke*, 5 Peters, 480.

In *Robinson v. Leavitt*, *supra*, the question is discussed at length, holding with *Freeman v. Paul*, 3 Maine, 260, and *Thompson v. Chandler*, 7 Maine, 377, that an incumbrance is to be kept on foot or considered extinguished or merged, according to the intent or interest of the party paying the money.

In *Twombly v. Cassidy*, 82 N. Y. 155, it is held that one who has paid the money due upon a mortgage of lands to which he had a title that might have been defeated thereby, has the right to hold the land as if the mortgage subsisted and had been assigned to him; and in *Cobb v. Dyer*, 69 Maine, 494, this doctrine was extended to the case of a mortgage formally discharged. See also *Hatch v. Kimball*, 16 Maine, 146; *Pool v. Hathaway*, 22 Maine, 85.

It is a well established rule that a surety on paying the debt of his principal, is entitled to be subrogated to all the securities, funds, liens and equities, which the creditor holds against the principal debtor; and in *Hodgson v. Shaw*, 3 Mylne & K. 183, Lord BROUGHAM says: "It is hardly possible to put this doctrine too high."

"Subrogation relates back to the time of entering into the contract of suretyship as against the principal and those claiming under him." *McArthur v. Martin*, 23 Minn. 74; *Wood v. Lake*, 62 Ala. 489.

One who secures the payment of another's debt by a charge or mortgage upon his own property, is upon payment of the debt, entitled like any other surety, to be subrogated to the benefit of the securities held by the creditor from principal debtor. *Lewis v. Palmer*, 28 N. Y. 271; *McNeale v. Reed*, 7 Irish Rep. Ch. 251; *Sheidle v. Weishles*, 16 Penn. St. 134; *Denny v. Lyon*, 38 Penn. St. 98.

And this is not affected by the fact that the charge and debt are created by the same instrument. *McNeale v. Reed*, *supra*; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Dedzler v. Mishler*, 37 Penn. St. 82.

As against Richardson, and his grantees with notice, the right of Lynn to have the mortgage held still subsisting, can hardly be questioned. *Buchannan v. Clark*, 10 Gratt. 164; *Butler v. Biskey*, 13 Ohio St. 514; *Field v. Hamilton*, 45 Vt. 35; *Cherry v. Monro*, 2 Barb. Ch. (N. Y.) 618; *Aiken v. Gale*, 37 N. H. 501.

In *Duncan v. Drury*, 9 Penn. St. 322, it was held that where one of the owners of land which is subject to a mortgage, pays the entire mortgage, he may still hold the lien as against his cotenant and those claiming under him.

Under *Fisher v. Dillon*, 62 Ill. 379, Lynn should have a right to hold Richardson's share for the entire mortgage debt, it having been for purchase money and paid by Lynn as surety.

The grantee of the property of the principal debtor, who has actual or constructive notice of the incumbrance, and of the

respective rights of the parties, will be in no better position than his grantor; he must pay the whole debt. *Cherry v. Monro*, 2 Barb. Ch. 618; *Crafts v. Crafts*, 13 Gray, 360; *Cook v. Hinsdale*, 4 Cush. 134.

Spear and Clason, for the defendants.

DANFORTH, J. It is evident that under the facts stated in the bill in this case, which are admitted by the demurrer, no decree can be passed which will aid the plaintiff in obtaining his rights. His prayer is that the mortgage described in his bill and the debt for which it was given to secure, and which he has paid, "may be decreed to be still subsisting; that he may be subrogated to the rights of the mortgagee therein, and may be empowered to foreclose the same according to law."

The facts show that when the plaintiff paid the debt, both the note and the mortgage were surrendered to him, "without cancellation or discharge executed thereon, or on the record thereof," and by a fair inference that no discharge was intended by either party. The mortgage, then, is subsisting by virtue of these facts, and a decree of court could add nothing to its force, would not change the facts, or to any extent change the condition or rights of the parties. When the plaintiff seeks to enforce his mortgage, he must stand or fall by the facts as they shall then appear, regardless of any decree of the court, or the want of it. Here is no discharge to be cancelled, as in *Cobb v. Dyer*, 69 Maine, 494; no fraud or mistake to be rectified; nothing for the defendants to do, or to refrain from doing; nothing to be accomplished by the decree asked; and if granted, it would leave the parties in the same relative position in which it finds them.

It further appears that the plaintiff paid the debt secured by the mortgage as surety, and to relieve his own land from the incumbrance. This would entitle him to be subrogated to all the rights of the creditor and mortgagee to and under the mortgage, except so far as he may have lost them by some act or omission of his own. *Cummings v. Little*, 45 Maine, 183; *Norton v. Soule*, 2 Maine, 341; *Crafts v. Crafts*, 13 Gray, 360.

And this would be so, even though the surety were also mortgagor. *Kinnear v. Lowell*, 34 Maine, 299. But this subrogation can not be accomplished by a direct decree of the court, but only by acting upon the proper parties and under a proper issue. In this case the creditor was the owner of the mortgage, and upon the payment of the debt it was its duty to make such a transfer as would enable the plaintiff to avail himself of it in the same manner as the mortgagee could do, subject, of course, to such paramount rights as subsequent purchasers might have acquired, if any. In case of a refusal to perform this duty, the court upon the presentation of the proper issue, and between the proper parties, could and would have compelled such performance. *Wall v. Mason*, 102 Mass. 313. But here the creditor is not a party, and hence no such decree can be made. When the plaintiff paid the note, the mortgage was surrendered uncanceled. Had this been sufficient to have enabled the plaintiff to enforce his rights, there would be no occasion for a decree of court. If not sufficient, a decree such as is asked for would be of no avail.

It is equally evident that a decree empowering the plaintiff "to foreclose the mortgage according to law," would not only be unavailing, but unauthorized. If he has that right the court could, by a decree, neither aid nor hinder. If there is anything lacking, the decree would not supply it. There does not appear to have been any assignment of this mortgage, and though the court might compel one in a proper case, it can not make one for the parties. That the plaintiff is entitled to one, may be clear enough. *Wall v. Mason*, *supra*; *Allen v. Clark*, 17 Pick. 47. That he must have one to entitle him to foreclose and thereby obtain a legal title to the land, is perhaps equally clear. *Prescott v. Ellingwood*, 23 Maine, 345; *Lyford v. Ross*, 33 Maine, 197.

But if the bill is intended as a process of foreclosure in equity it is equally unavailable. *Shaw v. Gray*, 23 Maine, 174. It is true that since this decision the equity powers of the court have been enlarged. But at that time the court had equity jurisdiction "in suits for the redemption or foreclosure of

mortgages," and now, as then, the statute, except in a few instances not applicable, provides specifically the several methods by which mortgages may be foreclosed, and no other method can be allowed, even by agreement inserted in the mortgage. *Chase v. McLellan*, 49 Maine, 378.

As stated in *Titcomb v. McAllister*, 77 Maine, 357, "there may be instances of chattel mortgages where the statute mode of foreclosure would not be applicable, or would not provide a plain, adequate and complete remedy for the mortgagee. In such instances, the court might afford relief in equity;" so possibly in mortgages of real estate, where it is necessary to resort to extrinsic matters in aid of a foreclosure, the statute provision might not be sufficient. But this is not a chattel mortgage, nor are there any facts developed which make it an exception to the general rule.

In *Cobb v. Dyer*, *supra*, the decree was not technically one of foreclosure, but rather one of sale founded upon a special provision in the mortgage authorized by a later statute, and under facts not applicable to this case. The mortgage now in question, so far as appears, is of the common form, containing no provision in relation to a foreclosure; so that if the plaintiff resorts to the mortgage for security he must foreclose in some one of the methods provided by the statute. In either of these ways completed he would acquire a title to the land. In neither of them can the defendants, or either of them, be compelled to redeem, nor can the court order a sale. It does not as yet appear that any of the defendants propose to redeem. Hence there is no occasion to settle the amount due on the mortgage. That can be done only in an action at law to foreclose, or by a bill in equity by the owners of the equity of redemption to redeem. By this latter process and perhaps by the former, not only the amount due on the mortgage, but the proportion which each party must pay, will be directly presented. It cannot be in the process now before the court.

Bill dismissed with single costs.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

ROSE L. WILLIAMS vs. SAMUEL BUNKER.

Somerset. Opinion September 23, 1886.

Trespass. Replevin. Officer. Aid to officer.

One who procures a replevin writ to issue and causes it to be served, by which property is taken which belongs to a third person, is liable in trespass to the owner of the property; and the fact that he acted as the servant of the officer in making the service, would not protect him, even though the officer himself might have a valid defence.

ON REPORT.

Trespass for taking and carrying away a cow and calf belonging to the plaintiff, May 8, 1885. The writ was dated August 17, 1885. The opinion states the material facts.

Walton and Walton, for the plaintiff, cited: R. S., c. 82, § 13; *Fuller v. Miller*, 58 Maine, 40; *Willard v. Kimball*, 10 Allen, 211; *Libby v. Soule*, 13 Maine, 310; *Shipman v. Clark*, 4 Denio, 446; *Itsley v. Stubbs*, 5 Mass. 280; *Miller v. Baker*, 1 Met. 27; *Phillips v. Hall*, 8 Wend. 610; *Root v. Chandler*, 10 Wend. 110; *Herring v. Hoppock*, 15 N. Y. 409; *Davis v. Newkirk*, 5 Den. 92; *Wetzell v. Waters*, 18 Mo. 396; *White v. Dolliver*, 113 Mass. 400; *Stimpson v. Reynolds*, 14 Barb. 506; *Carpenter v. Lott*, 31 Hun. 349; *Davis v. Gambert*, 57 Iowa, 239.

D. D. Stewart, for defendant.

The plaintiff's declaration alleges a joint trespass against two defendants, on May 8, 1885, by taking and carrying away a cow and heifer, alleged to be her property.

The defendants pleaded specially in bar that one of them was a deputy sheriff and took the cow and heifer under and by virtue of a writ of replevin against one Eli M. Steward, in favor of one Samuel Bunker, and that the other defendant acted simply as his servant, by his command aiding and assisting him in the service of said writ of replevin, and in executing the mandate of said writ; and that this is the trespass complained of in the

plaintiff's writ. The plaintiff's demurrer admits that these are the facts, and that this is the trespass for which this suit is brought.

Two questions, then, arise upon the demurrer :

1. Is the plea in bar sufficient in form?
2. Is it sufficient in substance to bar the action?

1. As to the first question, the plea was drawn upon the following precedents and authorities: 3 Chitty's Pleading, "Trespass," 1083, 1087, 1094, 1096, 1098, 1100, 1110, 1129, 1130, 1133, 1136, 1137, 1139; Story's Pleading, "Trespass," 566, 569, 573, 574, 592, 608; *Chambers v. Donaldson*, 11 East. 66; *Moors v. Parker & al.* 3 Mass. 310; *Cushman v. Churchill*, 7 Mass. 97; *Potter v. McKenney*, 4 East. Rep. 199; *Adams v. McGlinchy & al.* 66 Maine, 475.

2. Upon the second question, the following authorities appear to be decisive: *Moors v. Parker & al.* 3 Mass. 310; *Cushman v. Churchill*, 7 Mass. 97; *Willard v. Kimball*, 10 Allen, 211; *Oystead v. Shed & al.* 12 Mass. 506; S. C. 13 Mass. 520; *Darling v. Kelly*, 113 Mass. 29; *Lockwood v. Perry*, 9 Met. 445; LORD KENYON, C. J., in *Belk v. Broadbent*, 3 Term R. 184-5; *Luddington v. Peck*, 2 Conn. 701; *Watson v. Watson & al.* 9 Conn. 141; *Curry v. Johnson*, 13 R. I. 121; *Foster v. Pettibone*, 20 Barb. 350; *Potter v. McKenney*, 78 Maine, 80, opinion by LIBBEY, J.; 4 East. Rep. 199; *Adams v. McGlinchy & al.* 66 Maine, 475.

DANFORTH, J. This is an action originally commenced against two defendants, one of whom was a deputy sheriff. But before the pleadings were filed the writ was amended by a discontinuance as to the officer. A special plea in bar was filed setting out that the property in question was taken by the officer upon a replevin writ duly issued against one Eli M. Steward, and that the other defendant acted as the servant and under the directions of the officer in the service of the replevin writ, "which is the supposed trespass complained of." To this plea there is a demurrer and joinder.

It is undoubtedly true that an officer acting within his pre-

scribed duties in taking, under a writ of replevin, from the possession of the defendant therein named, the specific property therein described, would not be guilty of trespass, even though the title might be in some third person. *Willard v. Kimball*, 10 Allen, 211. The officer while in the performance of his legal duties is protected by the law. It is also true that what he can lawfully do, he can, if necessary, avail himself of the assistance of another in doing, and the law will furnish the same protection to the servant as to the master, but not beyond that.

In this case, though the replevin writ describes the property as taken and detained by the said Eli M. Steward, the plea does not allege it was in his possession when taken by the officer. Whether the writ would authorize the officer to take even the specific property described if not found in the possession of the defendant, may perhaps be more than doubtful. *Stimpson v. Reynolds*, 14 Barb. (N. Y.) 506. But we rest the decision in this case upon another point.

It sufficiently appears from the papers in the case at bar, that this defendant and the plaintiff in the replevin suit are one and the same person. This is shown by the fact that the name and residence are the same, and by the recitals in the plea. After describing the replevin writ, the parties, service, and the delivery of the property to the plaintiff therein, the said Samuel Bunker, the plea further states that such "service of said replevin writ in manner aforesaid, by the said E. M. Steward, as deputy sheriff aforesaid, the said Samuel Bunker, the other defendant in the present suit, aiding and assisting him as his servant, was the trespass complained of," &c. Surely the Samuel Bunker named as defendant, by the word "said" is directly referred to the previous Samuel Bunker named as plaintiff in the replevin suit, and must therefore be the same person.

Hence the defendant in this suit does not stand in the same position as if a stranger to the replevin writ. Here is introduced another and a distinct element. He is perhaps to some extent a servant to the officer, but he is also something more. He is principal as well as servant. It was through his instrumentality that the replevin writ was issued, through his procurement that

the service was made, and it was his act by which he received possession of and appropriated the property in question. These acts were not within the province of the officer, and if illegal he could not justify them, nor would his command protect the defendant from the consequences of that illegality, even though he might be innocent in the performance of his own duties. This view is consistent with the authorities cited to sustain the defence.

There may be a statement in the opinion in *Adams v. McGlinchy*, 66 Maine, 480, which seems at first view to support the defence in this case. But an examination will show the contrary. That was an action of trespass for property taken upon a replevin writ, in which the defendant in replevin was the plaintiff and not, as in this case, a third party. In that case the defence was property in the plaintiff in the replevin suit. But the officer had never returned the replevin writ, and thereby became a trespasser *ab initio*. It was therefore said in that case in substance that the claimant of the property having resorted to replevin to recover possession, and acted as an aid to the officer in obtaining that possession, was so far a servant of the officer that he must stand or fall with him. This was true as applied to the facts in that case. If the service had been completed by the return of the writ, there would have been no occasion for an action of trespass, nor could one have been maintained. As it was not, there was no service to protect either the officer or his servant.

In this case the plaintiff is a third person, neither a party or interested in the replevin suit. A judgment in that would have no effect upon her rights, much less would a mere pendency of the action. If, therefore, the property is hers, any legal remedy must be open to her to recover possession of it, or damages against the wrong doer. There is no allegation in the plea that the property in question did not belong to her, or that it did belong to the defendant, and hence no admission arising from the demurrer upon that point. That question is still open. In *Isley & al. v. Stubbs*, 5 Mass. 280, it was held under like circumstances, that an action of replevin would lie. This could

only be on the ground that the plaintiff was wrongfully deprived of his property, and the same facts would sustain trespass.

*Demurrer sustained. Special plea
in bar adjudged bad.*

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ.,
concurred.

INHABITANTS OF ETNA vs. INHABITANTS OF BREWER.

Penobscot. Opinion September 28, 1886.

*Pauper settlement. Commitment to Insane Hospital. Evidence. Residence.
Home.*

Where the settlement of a pauper is in dispute, and a prior settlement is admitted to have been in the defendant town, the burden is upon the defendant to show that the pauper has gained a settlement elsewhere by a residence of five successive years without receiving supplies, directly or indirectly, as a pauper.

In a suit by one town against another to recover the expenses of examination, commitment and support of an insane person in the insane hospital, where it appears that the municipal officers had the evidence and certificate of the two examining physicians before them upon which to base their proceedings of commitment, and the certificate of commitment and of the physicians is introduced and received in evidence without objection, the verdict will not be set aside on the ground that the evidence fails to show that the municipal officers kept a record of their doings as required by R. S., c. 143, § 13.

The question of residence is in part one of intention.

Declarations accompanying the act of leaving a town where a person's residence is, expressing the object and purpose of making a home in another town, or of performing acts indicating a change of residence from that town, are admissible in evidence on the question of intention.

They accompany an act, the nature, object or motive of which is a proper subject of inquiry, and as such, are a part of the *res gestae*.

No one can become a member of another person's family, so as thereby to gain a home within the meaning of the law relating to the settlement of paupers, unless voluntarily there, and with the consent of the one having control thereof.

On exceptions and motion to set aside the verdict.

The case is stated in the opinion.

John Varney, for the plaintiffs, cited: R. S., c. 143, § 34;
1 Whart. Ev. 265, 266.

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Jasper Hutchings, for the defendants.

It can make no difference in principle whether the severance of the marital relation had continued one day or ten years. See the cases cited in *Lewiston v. Harrison*, 69 Maine, 507.

In favor of personal liberty and to guard against sane persons being imprisoned on a charge of insanity, all the requirements of the statute, expressed or implied, should be fully and strictly complied with. R. S., c. 143, §§ 13 & 34; *Naples v. Raymond*, 72 Maine, 213.

FOSTER, J. The plaintiff was the prevailing party in an action brought to recover for the expense of examination and commitment to the insane hospital, and for support there furnished to one Martin V. B. Hutchings; and for pauper supplies furnished his wife, Melinda, whose settlement was alleged to be in the defendant town. The case is before the court upon motion and exceptions, and from a careful examination we are satisfied that neither can be sustained.

It was admitted that the pauper at one time had a settlement in the defendant town earlier than that which the defendants claimed he had acquired in the plaintiff town. But the ground taken in defence was that he had moved into the plaintiff town some time in the fall of 1874, and acquired a settlement therein by a residence of five successive years without receiving supplies directly or indirectly as a pauper. This proposition was upon the defendants to sustain by proof, a prior settlement of the pauper in the defendant town having been admitted. The evidence was more or less circumstantial and somewhat conflicting, and the jury, by their verdict, as well as in their special findings, have found that the pauper did not acquire a settlement in the plaintiff town by a residence of five years therein after 1874. The evidence does not so strongly preponderate in favor of the defence as to warrant the court in setting aside the verdict.

But the defendants' counsel claims that there is no proof that the record of the doings of the municipal officers in making the commitment, as called for by R. S., c. 143, § 13, was ever made by them, and that the failure to observe the directions of the

statute in this respect should preclude the plaintiffs from recovering of the defendants the sums which they have paid for the examination, commitment and support of said Hutchings. This objection does not appear to have been raised at the trial. The case shows that the certificate of commitment and of the two examining physicians, as well as attested copies of the same, together with other facts, were introduced and received in evidence at the trial without objection. Had objection been raised at that time to the manner of proof relating to the proceedings of the municipal officers in the premises, possibly the plaintiffs might have been able to substitute that which the defendants now claim was the proper evidence for what was in fact received without objection. The defendants are not in a situation to take advantage of what was tacitly waived at an earlier stage of the case. *Bowdoinham v. Phippsburg*, 63 Maine, 497. Taking the facts to be true as disclosed by the evidence before us, there is no such irregularity in the proceedings as in the case of *Naples v. Raymond*, 72 Maine, 217. In that case the proceedings were in fact defective, inasmuch as the selectmen never had the evidence and certificate of the physicians before them upon which to base their proceedings of commitment. It is otherwise in the case under consideration.

Exception is taken to the admission of the declarations of the purpose of the pauper, while in the plaintiff town, of buying land in the town of Stetson, when setting out to go to the town of Carmel.

The plaintiffs' claim was that the pauper's residence in the plaintiff town ceased at the time he sold his farm in 1879 and went to Stetson; on the other hand it was claimed by the defence that his home continued in the plaintiff town after that time, and this was in issue before the jury. The continuation or cessation of residence in the plaintiff town was in part a question of intention. It seems that the pauper was then occupying a house in Stetson belonging to one Wing, and came over to witness' house in the plaintiff town and borrowed his horse for the purpose of going to see a man by the name of Shaw, in Carmel, who owned the piece of land lying in Stetson

which the pauper was desirous of purchasing. His expressed purpose in going to Carmel was to see about the purchase of this piece of land in Stetson, the town in which he was then living. The owner of the land lived in Carmel, and it became necessary for him to go there in order to make the purchase. The house in which he was living he could buy, as he states, but the land he could not till he saw the owner. Had the owner of the land been living in Stetson at the time, and the pauper's declarations related to a visit to him there for the purpose of purchasing the land, then their admissibility would not be questioned. The principle on which those declarations are received in evidence is the same, whether the pauper was about leaving the plaintiff town, at the time the declarations were made, to go to Carmel or to Stetson, his expressed object and purpose being the purchase of a parcel of land lying in the latter town. The issue was whether the pauper's home had ceased to exist in the plaintiff town. The question being one in part of intention, how could that intention be shown better than by his declarations communicated at the time? Such declarations are a part of the *res gestæ*. They accompany an act, the nature, object or motive of which is a proper subject of inquiry. They are verbal acts, and as such are legal evidence of his intention. *Gorham v. Canton*, 5 Maine, 266.

The other exception relates to a question upon cross examination as to whether the pauper had any more right to come to the house of the witness in the years 1880 and 1881 than he had in 1872 and 1873, when in Brewer.

It was not insisted at the trial, nor do the defendants now claim in argument, that the pauper had any home or right to a home at the house of the witness in 1872 or 1873. As no one can become a member of another person's family, so as thereby to gain a home within the meaning of the pauper laws, unless voluntarily there, and by the consent of the one having control, the question may be regarded as admissible. It was upon cross examination, and may well be understood as interrogating the witness relative to any right or permission given by him to the

pauper to make a home in his family during the years named.

Motion and exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

ALVIN A. DORITY vs. MARLIN DUNNING.

Penobscot. Opinion September 28, 1886.

Waters. Aqueduct. Easement. Prescription. Extinguishment of Easements Damages.

An easement originating from water supplied by a spring not situated upon land belonging to the grantor of the plaintiff's premises, will not pass as an appurtenance to the estate conveyed, unless it has become attached to the same.

But where such easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee.

There may be such an adverse and exclusive use of water flowing through an aqueduct, and for such a period of time, as may well be considered presumptive evidence of a grant.

Such right may thereby be acquired by prescription.

The right to draw water from a spring and to have pipes laid in the soil of another, and for that purpose to enter thereon, repair and renew the same, constitutes an interest in the realty, assignable, descendible and devisable.

Easements growing out of it may be acquired by grant or prescription, and thus become the objects of title in others.

An easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right.

But in order that the unity of title shall operate to extinguish an existing easement, the ownership of the two estates must be coextensive, equal in validity, quality, and all other circumstances of right.

If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of such easement.

The rule of damages in actions for the wrongful diversion of water stated.

ON report. The opinion states the case.

Davis and Bailey, for the plaintiff, cited: *Watkins v. Peck*, 13 N. H. 360; *Hollenbeck v. McDonald*, 112 Mass. 250; *Goodrich v. Burbank*, 12 Allen, 459; *Philbrick v. Ewing*, 97 Mass. 134; *Ivimey v. Stocker*, L. R. 1 Ch. App. 396;

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Stanwood v. Kimball, 13 Met. 533; *Arbuckle v. Ward*, 29 Vt. 43; *Reed v. West*, 16 Gray, 284; *Atlanta Mills v. Mason*, 120 Mass. 251; *Tucker v. Jewett*, 11 Conn. 321; *Thomas v. Thomas*, 2 C. M. & R. 34; *Ritger v. Parker*, 8 Cush. 145; *Grant v. Chase*, 17 Mass. 447; *Hazard v. Robinson*, 3 Mason, 278; *Angell, Watercourses*, (6th ed.) § 191 *et seq.*; *Wallace v. Fletcher*, 10 Foster, 453; *Coolidge v. Hager*, 43 Vt. 9; *Vermont Cent. R. Co. v. Hills*, 23 Vt. 685; *McLellan v. Jenness*, 43 Vt. 183.

Full costs should be allowed in this case. *Williams v. Veazie*, 8 Maine, 106; *Sutherland v. Jackson*, 32 Maine, 80.

John Varney, for defendant.

The testimony of all the witnesses show that whatever participation in the benefits of the main aqueducts have been enjoyed by the Truxton Dority estate were permitted under contract and agreement, and paid for by rental, in contribution of money, and services towards its repair. Such "user" can, in no sense, it is submitted, be regarded as adverse, and consequently not the basis of prescriptive title. If the arrangement was by parole, it would, at most, be but a revocable license. The authorities sustain this view, and it is believed that the case *Watkins v. Peck*, 13 N. H. 360, is not in conflict with it. Wash. on Easements, 2d ed. pp. 106, 124, 125, 380.

An undivided, common interest, can not be servient, while the co-interests in the same estate are not subject to the same service. Such a rule would seem to be the only one admitting of practical application. Wash. on Easements, 2d ed. p. 150.

Attention is again called to the language in the deed from the Pattens to plaintiff, as to the branch water pipes. In the case on plaintiff's brief on this point, *Philbrick v. Ewing*, 97 Mass. 134, it was held that, although the branch pipe passed, the right to the water from the main aqueduct did not, for the reason that the owner of the branch pipes did not own the main aqueduct. He was, however, a stockholder in the company which did own the main aqueduct, and as such, had the flow of water from the main aqueduct into his branch pipes.

FOSTER, J. This is an action on the case for diverting the water running in an aqueduct to plaintiff's house and stable. From the evidence reported, the following facts, essential to a correct understanding of the case, affirmatively appear.

In 1836, Daniel Herrick took a lease of a certain spring with the right to conduct water therefrom through the lessor's land for the term of nine hundred and ninety-nine years. Having soon after obtained the right to lay pipes through adjoining lands, the lessee immediately constructed an aqueduct from said spring to Charleston Corner, a mile distant, more or less. The several places taking water from this aqueduct were accustomed to pay an annual water rent, except the Jacob Dority place, the Isaac Dunning place, now owned by the defendant, and the Truxton Dority place, now owned by the plaintiff. These were the first three places lying along the line of the aqueduct, and in the order named; and it is claimed by the plaintiff that these three received the water under perpetual rights derived by grant from said Herrick, or by prescription. It appears that the parties occupying these places, and their successors, have always borne their proportional part of the expense in maintaining the aqueduct, and that the water has run to their houses and barns by means of branch pipes in the same manner for more than forty-five years. After leaving the defendant's premises the aqueduct passes to the plaintiff's land in the rear of his dwelling house, and there the water has been accustomed to enter what is termed a main cistern, and from that to run in branch pipes to his house and stable. This continued till the fall of 1881, when it is alleged that the defendant diverted the water, thereby preventing it from flowing to the premises of the plaintiff, and for such diversion this action is brought.

Daniel Herrick died in 1864, and his son, as administrator on his estate, in 1869 sold the rights of the deceased in this aqueduct to the defendant, and one David H. Patten, who then lived where the plaintiff now lives. Patten died, and by will left all his property to his wife and daughter, who in 1879 conveyed to the plaintiff the premises where he now lives, by warranty deed, adding to the description this clause—"also all the branch water

pipes running from the main cistern to the house and stable."

A short time after this conveyance they conveyed their undivided half of the aqueduct, derived from the administrator of Daniel Herrick's estate, to the defendant, who since that conveyance has assumed the absolute right to control the water in the aqueduct to the entire exclusion of the plaintiff, and has completely diverted the same from his premises.

The plaintiff's claim is based upon the ground that this water right was an easement legally appurtenant to his estate and passed to him at the time he received his conveyance from the Pattens.

To determine the correctness of this position we must first ascertain whether the easement was one that had ripened into a legal right and had become legally attached to the premises conveyed. For this easement, originating from water supplied by a spring not situated upon land belonging to the grantor of the plaintiff's premises, would not pass as an appurtenance to the estate conveyed unless it had thus become attached to the same. *Spaulding v. Abbot*, 55 N. H. 423.

But when an easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription which presupposes a grant, a conveyance of that estate will carry with it such easement whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee. 2 Wash. R. P. *28. *Hent v. Waite*, 10 Pick. 138. Hence if Patten in his lifetime, aside from any interest conveyed by Herrick's administrator, was the owner of this easement as annexed to this particular estate, it passed with the estate to his wife and daughter, and from them would have passed to this plaintiff as appurtenant to the premises conveyed, even if no mention had been made of it in their deed to him.

And from all the evidence in the case, any extended summary of which would hardly be deemed proper in an opinion, we can arrive at no other conclusion than that this easement had become appurtenant to the estate long before it came into the hands of Patten. The testimony of Place shows that in 1845, after it had

been in operation about nine years, he hired the aqueduct of Herrick for four or five years, and has always known it and had charge of the repairs upon it till within a few years; that during the time he hired it, he leased the use of the main pipe to those parties along the line of it and who were accommodated by it, except Truxton Dority, who then lived on the place now owned by the plaintiff, Isaac Dunning, then living where the defendant now lives, and a party on the Jacob Dority place, "reserving to these individuals their rights which had been sold to them; and they were under obligations to do their proportion towards the repairs on the main pipe if any repairs were needed." He also testifies that Truxton Dority paid somewhere about \$100.00 for his right, and that this was one of the places reserved by Mr. Herrick from the payment of rent. This testimony is corroborated by that of Daniel Herrick's son and administrator, who worked upon the aqueduct when a boy and remembers the fact of these three parties owning their water rights. Moreover, the testimony of E. S. Higgins, formerly an owner of the property now held by the plaintiff, shows that as long ago as 1860 he had a separate deed, in connection with his title to the premises, of the water right belonging to the place, made out from what he terms the old Daniel Herrick deed.

As tending to corroborate these facts it will be found upon examination that the evidence is clear and uncontradicted, that for more than forty-five years the plaintiff and those under whom he claims, have enjoyed the use of the water flowing substantially in the same manner to the house and stable upon the premises. During all this time it has passed through the premises formerly known as the Isaac Dunning place, and now held by the defendant. During all these forty-five years, the right of the plaintiff and of his predecessors in title thus to take and use the water, and to have it flow to them, has never been questioned or contested by any one till this controversy arose.

Even if there was not evidence of an express grant, these facts, showing an adverse and exclusive use of water during so long a period, might well be considered presumptive evidence of

a grant. *Watkins v. Peck*, 13 N. H. 370; *Wallace v. Fletcher*, 30 N. H. 452; *Ashley v. Ashley*, 4 Gray, 200; *White v. Chapin*, 12 Allen, 519; *Jewett v. Hussey*, 70 Maine, 437; *Murchie v. Gates*, 78 Maine, 304-5. "And this is as true," says PARKER, C. J., in *Watkins v. Peck*, *supra*, "in relation to water flowing through an aqueduct, for use at a house by the occupants, as it is in relation to the water of a river used for propelling machinery."

Under circumstances like these, the language of the court in *Tinkham v. Arnold*, 3 Maine, 123, may be considered as peculiarly appropriate. "The law," says MELLEN, C. J., in that case, "gives a natural construction to the conduct of the parties; and, after a long succession of years, presumes that the person enjoying the easement, having no right to enjoy it unless under the grant of the true owner, had such a grant; and that in consequence of it he had never been molested in his enjoyment."

What was the effect of the deed from the administrator of Daniel Herrick to the defendant and David H. Patten, and what was thereby conveyed to them?

The interest which Daniel Herrick had in the aqueduct was not only the right to draw water from a particular spring, but to have pipes laid in the soil of another, and for that purpose to enter thereon, repair and renew such pipes. This interest was more than an easement in gross; it was an interest in the realty, assignable, descendible and devisable. It was such an interest as was capable of being assigned as to a part or in gross. Easements growing out of it might be acquired by grant or otherwise, and thus become the objects of title in others. *Amidon v. Harris*, 113 Mass. 64. Thus the right to take water from this aqueduct was an easement, and so far as this right had not by grant or otherwise passed from the owner to any particular person or persons, or become annexed to any particular estate or estates, the same was subject to assignment by him. *Goodrich v. Burbank*, 12 Allen, 459; *Amidon v. Harris*, *supra*. But whatever easements or rights had been acquired by grant or otherwise from the owner of the aqueduct,

would enure to the benefit of the persons or estates of those who had thus acquired them, and would not, therefore, pass by the administrator's deed. Before the defendant and David H. Patten received the deed of this aqueduct from the administrator, Patten was the owner of the premises which were afterwards conveyed to this plaintiff. Annexed to these premises and appurtenant thereto was this easement or right to the water from the aqueduct in question. To this easement thus annexed and belonging to these premises, the defendant could certainly claim no right or title by virtue of the administrator's deed. If a like easement at that time existed in reference to the defendant's premises, neither could Patten have claimed any right or title thereto under that deed for the same reason.

But whatever title or interest the deceased Herrick had in the aqueduct passed to them, and of this they were owners in common.

Assuming that the court should find that an easement existed, such as we have mentioned, and had once become appurtenant to the premises now owned by the plaintiff, it is contended in defence that such easement became extinguished by unity of title to the dominant and servient estates in the same person—by David H. Patten owning the premises to which the easement had become annexed, and by taking to himself, by the administrator's deed, a half interest undivided in the main aqueduct.

That an easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right, is a principle of law too general and elementary to be questioned. But this principle, like many others, is subject to qualifications. In order that unity of title to the two estates should operate to extinguish an existing easement, the ownership of the two estates should be coextensive, equal in validity, quality, and all other circumstances of right. If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of such easement. *Ritger v. Parker*, 8 Cush. 147; 2 Wash. R. P. *85. Thus it was held by ABINGER, C. B., in the English court of Exchequer, in *Thomas v. Thomas*, 2 Cr. M. &

R. 34, in which case one estate was held in fee and the other for a term of five hundred years, that unity of possession did not extinguish the easement, but only suspended it during that unity of possession; and upon parting with the premises to different parties, the right revived.

In the application of these principles to the facts in the case at bar, we find that while Patten had an estate in fee in the premises to which the easement was annexed, his interest in the aqueduct derived from the administrator's deed, was but a chattel interest, not only fractional in quantity, but limited in its duration to the term of nine hundred and ninety-nine years. *Gay, Petitioner*, 5 Mass. 419; *Chapman v. Gray*, 15 Mass. 445; *Brewster v. Hill*, 1 N. H. 350; *Hollenbeck v. McDonald*, 112 Mass. 249; Bouvier's Law Dict. Title, "Chattel Interest," "Estate for years."

There was, therefore, no such unity of title and possession as would extinguish the easement in the premises while held by David H. Patten, and consequently they passed by devise to his wife and daughter, the plaintiff's grantors, with the easement still subsisting and appurtenant thereto.

They also took the one-half interest in the main aqueduct which Patten had acquired in his lifetime by the administrator's deed. While thus holding the legal title to the premises with the easement in the use of the water running to them as part and parcel thereof; while also holding the half interest in the aqueduct, they conveyed to the plaintiff, adding to the description of the premises this clause—"also all the branch water pipes running from the main cistern to the house and stable."

This conveyance to the plaintiff being made and recorded prior to the conveyance from them to the defendant of their interest in the main aqueduct, may be properly held to convey to the plaintiff whatever might be fairly said to pass by the terms of the deed, and which they owned at the time of the conveyance. Had the clause in relation to the branch water pipes not been inserted in the deed, the easement relative to the use of water being one actually belonging to the estate conveyed, would have passed by implication. *Philbrook v. Ewing*, 97 Mass. 134.

With that clause added, was it the intention that only the branch water pipes themselves should be conveyed? Or was it the intention, as well as the legal effect, that not only the branch water pipes, but also the easement in the use of the water passing through them upon the grantors' premises and which had become a legal appurtenance to the estate, and then in use by them, should also be conveyed? We are inclined to the latter view. It is not denied that the branch pipes would have passed without any mention thereof in the deed. Of what practical use, then, were the pipes six feet below the surface of the earth without the right to the water passing through them? It is an ancient maxim that when a person grants a thing, he is supposed also tacitly to grant such means of his own as are necessary thereby to attain the thing granted. *Broom, Legal Max. * 426*; *Shep. Touch. 89*; *Stanwood v. Kimball*, 13 Met. 533.

Laying out of the case all oral testimony in relation to what was intended to be conveyed, and looking at the deed in reference to its terms, the subject matter, and the circumstances surrounding the transaction, we feel satisfied that not only was it the legal effect of the deed, but also the intention of the grantors, to convey certain premises with the branch water pipes then in the soil and in use upon the granted premises, as in the case of *Coolidge v. Hager*, 43 Vt. 9; and that the defendant by his deed from the same parties, which was executed shortly afterwards, received a distinct property from that which had been conveyed to the plaintiff, being the same undivided half interest in the main aqueduct which years before had been deeded to Patten by the administrator of Daniel Herrick.

We have examined at some length the principal grounds upon which both parties base their claims. It is unnecessary to consider any others, inasmuch as we are of the opinion that the plaintiff is entitled to prevail.

The only remaining question is that in relation to damages. The acts of the defendant in diverting the flow of water to the plaintiff's premises was a misfeasance such as would render him liable in this action. It was in the nature of a continuing nuisance. The evidence in relation to these acts indicate that

the damage is temporary rather than of permanent injury to the realty. They do not appear to be of such permanent character as would seem to warrant us in assuming that they are to continue forever in the future, and thereby justify the assessment of damages accordingly. The cost of restoring the water to its accustomed channel could be but very slight, and it lies in the power of the defendant thus to restore it, thereby avoiding successive suits. In this case we adopt the rule laid down by this court in *C. & O. Canal Corp. v. Hitchings*, 65 Maine, 140, and the plaintiff will recover such damages only in this action as he had sustained at the time it was commenced. *Thompson v. Gibson*, 7 M. & W. 456; *Battishill v. Reed*, 18 C. B. 716; *Bare v. Hoffman*, 79 Penn. St. 71.

Judgment for the plaintiff for forty dollars damages.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

JOHN C. MCCLURE vs. D. P. LIVERMORE.

Kennebec. Opinion October 1, 1886.

Promissory notes. Estoppel.

- 1. A promissory note reciting "we" promise to pay, and signed "D. P. Livermore, Treas'r Hallowell Gas Light Co.," is the note of the individual and not of the corporation.
- 2. An action on such a note against the corporation, and its default, will not estop the owner from maintaining an action against the individual when it does not appear that the acts of the plaintiff caused the defendant to change his position, or to take some action injurious to himself.

ON report of facts agreed.

Assumpsit on the following promissory note:

"Hallowell, January 1, 1881.

"\$350.00. On demand after date, we promise to pay to the order of John C. McClure, three hundred and fifty dollars at Hallowell, with interest, value received.

D. P. Livermore,

Treas'r Hallowell Gas Light Co.,

The material facts are stated in the opinion.

78	390
89	57
78	390
98	528

Beane and Beane, for the plaintiff, cited: *Sturdivant v. Hull*, 59 Maine, 172; *Mellen v. Moore*, 68 Maine, 390; *Chick v. Trevett and als.* 20 Maine, 462; *Townsend v. Meader*, 58 Maine, 289; *Lynch v. Swanton*, 53 Maine, 100; *Merriam v. Whittemore*, 5 Gray, 317; *Hill v. Morse*, 61 Maine, 541; *Sargent v. Salmond*, 27 Maine, 539; *Marsh v. Masterson*, N. Y. case, 4 East. Rep. 246.

A. M. Spear, for defendant.

The agreed statement shows that McClure received the note as a corporation note and fully understood it to be such. That he so understood it is further absolutely proven by his bringing an action on it against the corporation.

"The entry of judgment against the corporation is a thing of course" which can be obtained by the plaintiff at any time. Freeman on Judg. p. 213.

LIBBEY, J. The note sued on contains no ambiguity. Its terms are clear and its meaning can readily be understood without resort to extrinsic evidence. The facts reported to be considered by the court if admissible, are not competent evidence to vary the plain meaning of the written contract. *Mellen v. Moore*, 68 Maine, 390; *Davis v. England*, 141 Mass. 590.

We think the note must be construed to be the note of the defendant, and not of the corporation. It contains no apt words showing that the parties understood it to be the contract of the corporation and not of the defendant. It nowhere appears that the defendant made the promise for the corporation. The language used expresses his own promise, and what is added after the signature is descriptive of the person. The following cases are directly in point: *Sturdivant v. Hull*, 59 Maine, 172; *Mellen v. Moore*, 68 Maine, 390; *Davis v. England*, 141 Mass. 590.

But it is claimed by the counsel for the defendant that the plaintiff is estopped from maintaining this action against him by commencing an action against the corporation on the same note, and prosecuting it to a default. That action has not gone to

judgment, and to create an estoppel it must appear that the acts of the plaintiff relied on, caused the defendant to change his position or take some action in regard to the note which will be injurious to him, if the plaintiff shall be permitted to charge him as the maker of the note. But the case is entirely barren of any such element. It does not appear that the defendant was in any way misled or induced to change his position to his injury by the suit against the corporation. There is no estoppel.

Defendant defaulted.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

STATE OF MAINE vs. WILLIAM TURNBULL and another.

Lincoln. Opinion October 14, 1886.

Criminal pleading. Migratory fish. Damariscotta river. R. S., c. 40, §§ 31, 43.

When all the sections of a penal statute taken together show that the act in question was intended to be forbidden only in particular localities, the complaint or indictment must allege that the act was committed in the particular locality to which the statute applies.

A complaint for fishing with weirs in Damariscotta river during Sunday close-time will be adjudged bad on demurrer, unless it is alleged that the weirs were located in that part of the river not exempted from the provisions of R. S., c. 40, § 43, by § 31 of same chapter.

ON EXCEPTIONS to the ruling of the court in overruling a demurrer to the following complaint:

(Complaint.)

"State of Maine. Lincoln, ss. To Thomas J. York, Jr. one of the trial justices within and for the county of Lincoln:

"William Vannah of Nobleboro in the county of Lincoln, on the fifteenth day of May in the year of our Lord one thousand eight hundred and eighty-four, in behalf of said State, on oath complains that William Turnbull and Edward Harrington, both of Edgecomb in the county of Lincoln, on the first day of May, A. D. 1884, and on divers other days and times between said first day of May and the day of making this complaint, did keep and maintain, for the purpose of taking alewives and other fish, a

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97 568

certain fish weir in the waters of the Damariscotta river aforesaid in said county of Lincoln, and that said William Turnbull and Edward Harrington were bound and required by law to take out and carry on shore the netting or other material which, while fishing, closes that part of said weir where the fish are usually taken, and let the same there remain during the weekly close time as prescribed and required by section forty-three of chapter forty of the Revised Statutes of Maine of the year 1883; to wit, during the time between sunrise on Saturday morning of the tenth day of May, A. D. 1884, and sunrise on the following Monday morning of the twelfth day of May, A. D. 1884, but the said William Turnbull and Edward Harrington did not take out and carry on shore the netting or other material which, while fishing, closes the part of said weir where the fish are usually taken, and let the same there remain during said close time as required by said statute, to wit: during the time between sunrise on Saturday morning of the tenth day of May aforesaid and sunrise on the following Monday morning of the twelfth day of May aforesaid, but did, then and there during said close time keep the part of said weir where the fish are usually taken as aforesaid closed, against the peace of said State and contrary to the form of the statute in such case made and provided. Wherefore the said William Vannah prays that the said William Turnbull and Edward Harrington may be apprehended and held to answer to this complaint and further dealt with relative to the same as the law directs. Dated at Nobleboro in the county of Lincoln this fifteenth day of May, A. D. 1884. William Vannah."

"State of Maine. Lincoln, ss. On the fifteenth day of May A. D. 1884, the above named William Vannah personally appeared and made oath to the truth of the foregoing complaint.

Before me,

Thomas J. York, trial justice."

Roswell S. Partridge, county attorney, for the State.

Upon an examination of the whole complaint it will be seen that the respondents had sufficient notice of the charge which they were to meet.

A *prima facie* case is well set forth in the complaint. The exceptions in §§ 60 and 63, c. 40, R. S., need not, by the rules

of pleading, be negatived in the complaint. Nor is it necessary to mention in the complaint the exemption found in § 31 (same chap.); see *State v. Boyington*, 56 Maine, 512; *Whar. Crim. Law*, § 378.

George B. Sawyer for the defendants, cited: *Parker v. Mill Dam Co.* 20 Maine, 353; *Moulton vs. Libbey*, 37 Maine, 472; *State v. McKenzie*, 42 Maine, 392; *State v. Hussey*, 60 Maine, 410; *State v. Baker*, 34 Maine, 52; *State v. And. R. R. Co.* 76 Maine, 411; *State v. Casey*, 45 Maine, 435; *State v. Collins*, 48 Maine, 217; *State v. Cottle*, 70 Maine, 198; *State v. Hobbs*, 39 Maine, 212; *State v. Carver*, 49 Maine, 588; 1 Russell, Crimes, 49; Hawk. Pl. Cr. c. 26, § 17; Jacob's Law Dictionary "Information"; *Wiscasset v. Trundy*, 12 Maine, 204; *Fassett v. Geyer*, 55 Maine, 160; *Beurce v. Fossett*, 34 Maine, 575.

EMERY, J. The provisions of § 43, c. 40, R. S., particularly that requiring an opening through weirs during the weekly close time, were evidently enacted for the protection of "migratory fishes." This complaint is for omitting to keep the weir open. Section 31 of the same chapter however expressly exempts certain waters "from provisions relating to migratory fishes," and among the waters so exempted are: "so much of the waters of the Damariscotta river as are west of the railroad bridge near Damariscotta Mills." Section 43 therefore cannot apply to that part of the Damariscotta river so exempted.

All the acts and omissions forbidden by § 43, are not forbidden in that part of that river. They are still lawful or harmless there, however unlawful they might be in other parts of the same river. They are not *mala in se*, and are *mala prohibita* only in one part of the river, to wit, that east of the railroad bridge. The locality of such acts or omissions, is therefore an essential element in constituting them an offence against the statute. To prove that they occurred in the Damariscotta river is not enough. They may properly occur in one part of the river. It must be proved that they occurred in the prohibited part, to make them an offence. If the locality is an essential part of the offence itself,

it is equally an essential part of the description of the offence, and should be alleged in any process charging the offence. This is not a case of a promise or excuse, which a respondent may or may not show in defence. He is not even *prima facie* guilty until he is shown to have done or omitted, in the forbidden part of the river.

The only statement of locality in this complaint is, "in the waters of the Damariscotta river." The complaint therefore does not set out any offence *prima facie*. The presumption would be, that the respondents acted or omitted lawfully, in that part of the river, not forbidden to them. All the matters charged may have occurred in that part of the river. All the allegations may be true, and the defendant offer no excuse, and still no offence have been committed. The allegation of *contra formam statuti* is not an allegation of fact, but simply a statement of a logical result, a result in law. If the premise is insufficient as in this case, the result does not follow. *State v. Boyington*, 56 Maine, 512, cited for the State, was clearly a case of proviso, or excuse. It was *prima facie* an offence to cast two ballots at a single election under any circumstances. There might, however, have been circumstances excusing it, and which could have been shown in defence. Such circumstances did not need to be negatived. The relative situation in a statute of its different sections, clauses and phrases is not the criterion in determining such a question, though it seems to be sometimes so stated. It may frequently solve the question, but it does not always do so. The question is, after all, one of legislative intent. Was it the intent to create a general offence, *prima facie* committible by all persons, at all times, or in all places, or was it the intent to create a limited offence, committible only by particular persons, at particular times or in particular places? If the former, the excusatory circumstances need not be negatived in the complaint. If the latter, the particulars of person, time or place should be alleged. In the *Boyington* case, *supra*, the statute evidently created a general offence, *prima facie* applicable to all elections and all circumstances. In this case, the statute creates a limited offence, limited by place, as well as in time.

The act only becomes a crime when done in a particular place. The complaint should charge the act as done in that particular place. Wharton's Crim. Law, § 380; *State v. Godfrey*, 24 Maine, 232; *U. S. v. Cook*, 17 Wall. 168.

Exceptions sustained. Demurrer sustained.

PETERS, C. J., WALTON, DANFORTH, LIBBEY and FOSTER, JJ., concurred.

JOEL WILBUR vs. ALDEN C. JOSSELYN.

Franklin. Opinion October 18, 1886.

Chattel mortgages. Conveyances. Practice. Requested instructions.

The owner of a pair of steers mortgaged them with other personal property to D, who assigned the mortgage to the defendant, but prior to the assignment, the owner *bona fide* released his right of redeeming the steers and sold them to D who subsequently sold them to K taking back a mortgage thereof for the purchase money, which mortgage, D assigned to the plaintiff. In trover against the defendant who had taken possession of the steers: *Held*, that the defendant's requested instruction,—that if D owned the steers when he delivered the mortgage to the defendant, that the title would pass to the defendant if D gave him to understand that the steers were included in the mortgage, was rightly refused, there being no testimony on which to base the instruction.

ON exceptions and motion to set aside the verdict.

The defendant excepted to the following instructions of the presiding justice: "Now this mortgage among other things contains this very yoke of steers that the parties are disputing about. Well, then, if there were nothing else in the case it would carry the assignment of the steers as collateral security and as the defendant paid the note he would have the better title to the property of the two parties.

"But now comes in the question of fact. Mr. Dennison himself is introduced as a witness. He says that at the time when the assignment or receipt was made, when this mortgage was conveyed to the defendant those steers now in dispute were not included in it, that another pair were, that this pair were not a part of the mortgage, they were taken out of it, out of what is called the bill of sale; in other words that Mr. McKeen had released his right to these steers, to the title of the property.

"Mr. Dennison says this was done previous to this assignment to the defendant ; now that is the question of fact. It comes from the testimony before you. It is disputed on the other side ; the defendant says it is not so, when that was conveyed to him the steers were still included in it, and this raises the real question of fact for you to decide between the parties, was that a *bona fide* sale of the steers from McKeen to Mr. Dennison, so that Mr. McKeen had released all right of redemption and they become absolutely the property of Mr. Dennison? If so, then, I instruct you as matter of law, they were not in the mortgage and the assignment would not convey the steers.

"There is the question for you to settle ; now he goes on further to state the manner which they were paid for by the creditor upon his book, that they became his property absolutely and entirely, and that subsequently either before or after that receipt, I don't know as I can tell which, and I don't know that it is material whether before or after, he says that he sold them to Mr. Keene (not McKeen, but Edwin R. Keene, the other was Orrin McKeen,) that he took from him a note for them secured by mortgage of the same steers. In process of time he assigned that note to the plaintiff in this case, Mr. Wilbur. Now if the sale to Mr. Dennison was absolute and complete and he subsequently sold to Mr. Keene and took this mortgage back and then conveyed the mortgage to Mr. Wilbur, that would give him a title independent of any papers that the defendant, Mr. Josselyn, had ; because as I have already said, that the sale, if absolutely made before the assignment to Josselyn, would take the steers out of his mortgage."

Defendant also excepted to the refusal of the presiding justice to give the following instructions to the jury, to wit : "If Dennison owned the steers at the time he let Josselyn have the mortgage that the title to the steers would pass to Josselyn if Dennison gave Josselyn to understand that the steers were included in the mortgage."

P. A. Sawyer, for the plaintiff, cited : *Daniels*, *Negotiable Instruments*, § 741 *et seq.* *Copeland v. Hall*, 29 Maine, 93 ; 33 Maine, 90.

B. Emery Pratt, for defendant.

If the trade between Dennison and McKeen was *bona fide* as between them, still the trade between Dennison and Josselyn would pass the title of the cattle to Josselyn ; the cattle remained Dennison's as they claim till September 29, one month after the mortgage of them passed to this defendant, and the circumstances are such as would estop Dennison from a denial of this defendant's title. *Rapalje & Lawrence's Law Dict. Title "Estoppel."* *Bouvier's Law Dict. Title "Estoppel."* 15 Mass. 110.

VIRGIN J. Trover to recover the value of a yoke of steers the title thereto being claimed by each of the parties. The defendant admitted that he took the steers from the possession of the plaintiff claiming to own them.

One McKeen, owning the steers, on February 27, 1884, mortgaged them with other live stock to one Dennison to secure a note for \$250, which mortgage and note together with sundry other notes and mortgages of personal property, Dennison, in August 29, 1884, delivered to the defendant as collateral security for the latter's signing as surety a bank note for \$1000, which note the defendant was obliged to pay after maturity.

The plaintiff claimed that, prior to the delivery of the mortgage and note to the defendant as collateral security, McKeen released his right of redeeming the steers and sold them outright to Dennison, who, on September 29, 1884, sold them to one Keene taking back a mortgage thereof to secure Keene's note for \$95, which note Dennison assigned to the plaintiff. This the defendant denied. The only witnesses were the parties. The jury, after seeing and hearing the witnesses testify, found that the sale from McKeen to Dennison was *bona fide*, which finding we do not consider it our duty to disturb.

There was no testimony on which the requested instruction could be based ; and if there were, the request was rightly refused. Dennison testified that he informed the defendant that the steers were not included in the mortgage when it was delivered to him ; and while the defendant denies that any such conversation took place, he testifies that no conversation at all in relation to the steers took place.

The other instructions could not injure the defendant; if the finding of the jury is correct, he has no title whatever on which to base any authority to take the steers from the plaintiff's possession, which was title enough for the plaintiff as against the defendant.

Motion and exceptions overruled.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

JOHN H. HAMMOND vs. PETER E. DEEHAN.

Cumberland. Opinion October 18, 1886.

Arbitration and award.

The award of an arbitrator, after stating his conclusion, contained the following clause. "In arriving at this result I have excluded every claim (including those for intoxicating liquors) submitted by said parties, except the following which I have allowed." Then follows a detailed statement of articles allowed each against the other, with the balance struck: *Held*, that the meaning of the award is, not that the arbitrator did not pass judgment upon all the claims submitted, but that he disallowed certain ones which the award declares he "excluded."

ON REPORT from the superior court.

Assumpsit on the award of an arbitrator for \$171.17.

E. S. Ridlon, for plaintiff, cited: 1 Esp. 194; Tidd's Practice, 756; Bouvier's Law Dict.. "*Insimul computassent*;" same, "Account stated."

D. A. Meaher, for defendant.

There has been a failure to determine a controversy submitted, to wit: every claim (including those for intoxicating liquors) submitted by said Deehan and Hammond; except a few named in the award.

The whole award is void. *Ott v. Schroepfel*, 1 Seld. 482; *Wright v. Wright*, 5 Cow. 197; *McNear v. Bailey*, 18 Maine, 251; *Richards v. Drinker*, 1 Halst. 307; *Harker v. Hough*, 2 Halst. 428; *Carnochan v. Christie*, 11 Wheat. 446; *Edwards v. Stevens*, 1 Allen, 315; *Varney v. Brewster*, 14 N. H. 49; *Stone v. Phillips*, 4 Bing. N. C. 37; *Mitchell v. Staveley*, 16 East 58.

The arbitrator in his award, expressly excepts, out of his decision, particular matter included in the submission, and this makes the award altogether bad. *Bradford v. Bryan*, Willis, 268; *Wright v. Wright*, 5 Cow. 197; *Ott v. Schroepfel*, 5 N. Y. (1 Seld.) 482; *Turner v. Turner*, 3 Russell, 494.

The motive which induced the arbitrator to omit the determination of a matter submitted, seems to be immaterial. A misconception of duty is no excuse for the omission. The award must be held void. *Bowers v. Fernie*, 4 M. & Cr. 150; *Brown v. Meverell*, Dyer, 216 b; *Wilkinson v. Page*, 1 Hare, 276; *Samuel v. Cooper*, 2 Ad. & El. 752; *Brophy v. Holmes*, 2 Molloy, 1.

The award should be co-extensive with the submission. *Bhear v. Harradine*, 7 Exch. 269.

Awards have the force of judgments. Wharton's Evidence, vol. 2, § 800, year 1877.

The averments in the award can not be collaterally impeached by parol. 1 Co. Litt. 260 a; *Glynn v. Thorpe*, 1 Barn. & A. 153; *Dickson v. Fisher*, 1 W. Black, 664; *Garrick v. Williams*, 3 Taunt. 544; *Gulpin v. Page*, 18 Wall. 365; *The Achorn*, 2 Abbott, U. S. 434; *Sanger v. Upton*, 91 U. S. (1 Otto) 56; *Ellis v. Madison*, 13 Maine, 312; *Dolloff v. Hartwell*, 38 Maine, 54; *Hall v. Gardner*, 1 Mass. 172; *Legg v. Legg*, 8 Mass. 99; *Wellington v. Gale*, 13 Mass. 483; *Kelley v. Dresser*, 11 Allen, 31; *Mayhew v. Gay Head*, 13 Allen, 129; *Com. v. Slocum*, 14 Gray, 395; *Capen v. Stoughton*, 16 Gray, 364; *Richardson v. Hazelton*, 101 Mass. 108; *Whiting v. Whiting*, 114 Mass. 494.

Additional facts which should be of record, cannot be added to a record by parol. *Wilcox v. Emerson*, 10 R. I. 270.

To ascertain the character of a judgment, we must look to the record of it alone. An omission cannot be added by parol. *Treftz v. Pitts*, 74 Penn. St. 349.

Parol evidence cannot be received to vary a written submission of award. *Barlow v. Todd*, 3 Johns. R. 367; *DeLong v. Stanton*, 9 Johns. R. 38; *Efner v. Shaw*, 2 Wend. 567.

VIRGIN, J. By the express terms of the submission, the arbitrator was made "sole judge of the law and fact arising between the parties."

The only objection raised against the award by the party against whom the balance was found, is, that the arbitrator did not determine the whole controversy submitted.

After stating his conclusion, the award recites: "In arriving at this result, I have excluded every claim (including those for intoxicating liquors) submitted by said parties, except the following which I have allowed," &c. Then follows a detailed statement of articles allowed each against the other, with the balance struck.

Without any explanation on the part of the arbitrator, the evident meaning of the award is, not that he did not pass judgment upon all claims submitted, but simply that he "excluded" certain ones (enumerated in his testimony) from his computation in the result, because he disallowed them, as well he might.

In accordance with the terms of the report, the entry must be,

*Judgment for plaintiff for \$171.17 and
interest from date of writ.*

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

STATE OF MAINE

vs.

INTOXICATING LIQUORS, and H. A. COBAUGH, treasurer, claimant.

Cumberland. Opinion October 18, 1886.

Intoxicating liquors. National Soldiers' Home, Togus.

Intoxicating liquors found in a freight railroad station in Portland, in transit from Portsmouth, N. H., to the National Soldiers' Home, Togus, at which place alone, they were intended for sale by the Home Storekeeper, are not liable to seizure under R. S., c. 27, § 39, *et seq.*

On exceptions from superior court.

Appeal from the municipal court of the city of Portland.

September 23, 1885, one of the constables of the city of

Portland, upon a warrant issued from the municipal court, seized at the freight depot of the Boston and Maine Railroad, Eastern Division, twenty half barrels of lager beer, marked "National Home Store, Togus, Maine."

The warrant, return, libel, monition and claim, were all in due form and seasonably filed.

The lager beer was the property of the National Home for Disabled Volunteer Soldiers, Eastern Branch, having been ordered by the treasurer from the Eldredge Brewing Company of Portsmouth, N. H., and was in transit from Portsmouth to the Home at Togus, Maine, when seized at Portland. It was intended for sale at the Soldiers' Home upon the territory covered by c. 66, public laws of 1867, as hereinafter stated.

Under date of September 30, 1869, the Board of Managers of the Home adopted the following vote :

"Whereas the experiment of an Asylum store has proved a success at the Central Asylum."

"Resolved, that the acting governor be directed to see that similar stores are established at the other two asylums, and that he set apart rooms at the asylum buildings at Milwaukee and Augusta for the purpose, direct the purchase of such goods as the inmates may be likely to need ; appoint storekeepers therefor, and see that the net profits of such stores be used for the increase of the libraries, furnishing of amusement halls and such other purposes as will best conduce to the enjoyment of the men,—provided that the acting governor shall audit the accounts of the stores at each asylum."

Under this vote a store was established at the Eastern Branch upon the territory aforesaid, and known as the "National Home Store." Among other articles kept therein, was lager beer, which was sold to inmates of the Home under rules and regulations established by the governor of the Home and approved by the Board of Managers. The beer in controversy was purchased by the treasurer under the vote aforesaid and was intended for sale in said store, under said vote and regulations, by a storekeeper acting under the directions of the governor and treasurer, the profits to be devoted to the purposes named in said vote.

Upon the foregoing facts, the presiding justice ordered the judgment of said municipal court affirmed. To this ruling the claimants alleged exceptions.

George M. Seiders, county attorney, for the State.

It is admitted that these liquors were found within this State and that they were intended for sale at the Soldiers' Home at Togus, Maine. It is violation of law to sell intoxicating liquors at said Togus. U. S. Rev. Stat. sec. 5391. The sale of these liquors at Togus then, would have been a violation of law. Is said Togus within the State? If so, then these liquors were liable to seizure, and should be forfeited.

H. M. Heath, for claimants, cited: *Houston v. Moore*, 5 Wheat. 27; *Com. v. Felton*, 101 Mass. 204; *Com. v. Clary*, 8 Mass. 72; *State v. Kelly*, 76 Maine, 333; R. S., c. 27, §§ 39, 40; *State v. Gurney*, 37 Maine, 149; *State v. Robinson*, 39 Maine, 150; *U. S. v. Paul*, 6 Peters, 141; *U. S. v. Doulan*, 5 Blatch. C. C. 284; *Fox v. State of Ohio*, 5 Howard, 438; 1 Whar. Cr. Law, § 173; U. S. R. S., c. 12, § 711; *Slocum v. Mayberry*, 2 Wheat. 1.

VIRGIN, J. Intoxicating liquors found in a freight railroad station in Portland in transit from Portsmouth, New Hampshire, to the National Soldiers' Home, Togus, at which place alone they were intended for sale by the Home Storekeeper, are not liable to seizure under R. S., c. 27, §§ 39, *et seq.*

By the terms of the statute such liquors only are liable as are kept and deposited "in the state intended for unlawful sale in the state," § 39, or "in violation of law," § 40. It is the intent of one having the title or authority to sell in violation of law which is to be regarded. *State v. Garland*, 63 Maine, 121.

The "Home" where the liquors were intended to be sold is on territory which has been ceded to the United States, over which no jurisdiction whatever is retained by this state save that reserved by St. 1867, c. 66, namely: for the execution of civil and criminal processes, issued under state authority, against persons "charged with offences committed outside of that territory"

which can have no possible application to cases like the one now under examination.

The laws of this state do not reach beyond its own territory and liquors sold in the ceded territory cannot be considered sold in violation of the laws of this state. On the other hand the jurisdiction of the federal courts is exclusive over all crimes or offences committed within such ceded territory. *Houston v. Moore*, 5 Wheat. 27; *Com. v. Clary*, 8 Mass. 72; *State v. Kelley*, 76 Maine, 333.

Exceptions sustained.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

FRANK H. HOLYOKE vs. CHARLOTTE E. HOLYOKE.

Penobscot. Opinion October 14, 1886.

Divorce. "Extreme cruelty." "Cruel and abusive treatment." Libel. Demurrer. Falsely charging infidelity.

"Extreme cruelty," as the third cause for divorce in the act of 1883, means "personal violence," intentionally inflicted, so serious as to endanger "life, limb or health," or to create reasonable apprehension of such danger.

Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, either body or mind, endangers "life, limb or health," and constitutes "cruel and abusive treatment," the sixth cause for divorce in that act.

The false charge of infidelity is not legal cruelty, but in a given case, may be proved to so operate.

The averment in a libel for divorce, that the conduct specifically charged impaired, or seriously threatened to impair health, is sufficient on general demurrer, without particularly stating how the health was impaired.

ON EXCEPTIONS to the ruling of the justice presiding in sustaining a demurrer to the following libel for divorce [omitting formal part] :

"That he always conducted himself as a faithful, chaste and affectionate husband, but that the said [libellee,] wholly regardless of her marriage vows and obligations, has been guilty of cruel and abusive treatment of him in this : that between the 1st of January, 1885, and the date of this libel, almost daily, when he was at home, she would continually and incessantly

charge him with want of chastity, with different women and at different times, all of which was groundless and unfounded ; this not only privately to him, but frequently at his own table and in the presence of his children, [one or both] aged 4 and 15 respectively, and sometimes in the presence of his servant. That between the dates last mentioned his business frequently called him away from home for a longer or shorter time, and no matter where he went or when he went she met him invariably with the accusation that he had a woman with him during his absence. That between the dates before mentioned, at his dinner table she has called him a liar, a whoremaster, and used words of similar import frequently in the presence of one or both of his children, and the servant. That the usual and general tone and character of the conversation she addressed to him whenever he was in the house, was of the description indicated by the foregoing allegations and that it was incessant day and night ; in fact she never spoke to him about general matters or matters about the house unless she was obliged to. That between the dates mentioned, it has come to his knowledge that she went to her friends and acquaintances, and circulated among them all sorts of charges of unchastity against your libellant. That in the management of the children, and by her acts, language and deportment and treatment of your libellant, in their presence, she has endeavored to estrange from him, both of said children. That she refused and has refused to cohabit with him since the middle of June last, without any just cause whatever, and has occupied another bed by herself, all of said time, and fails to take any interest in his comfort and to bestow any care upon his clothing, or do any other wifely act. That she avoids and ignores him in his own house so far as she can, and that her treatment of him as before indicated, has rendered his home so unhappy, that existence in it longer than is necessary for food and shelter is utterly unsupportable.

"And your libellant avers, that these acts of his wife, her said charges and her treatment of him, and conduct toward him as hereinbefore stated, have so affected his peace of mind and his feelings, as to affect his health and endanger his health for the

future, and that she has been guilty thereby of cruel and abusive treatment of him."

John Varney and F. H. Appleton, for the libellant, cited: *Carpenter v. Carpenter*, 1 Pac. Rep. 122 and cases cited; *Bailey v. Bailey*, 97 Mass. 373; *Kelly v. Kelly*, 51 Am. R. 732; *Pinkard v. Pinkard*, 14 Tex. 356; *Jones v. Jones*, 60 Tex. 469; *Scott v. Scott*, 61 Tex. 119; *Bahn v. Bahn*, 62 Tex. 518; *Lewis v. Lewis*, 5 Missouri, 278; *Smith v. Smith*, 8 Oregon, 101; *McMahan v. McMahan*, 9 Oregon, 525; *Palmer v. Palmer*, 45 Mich. 150; *Kennedy v. Kennedy*, 73 N. Y. 369; *Kelly v. Kelly*, 2 L. R. (Pro. & Div.) 31; 1 Bish. Mar. & Div. § 725, 732, 733.

Wilson and Woodward, for libellee.

What constitutes cruel and abusive treatment, as such phrase is used in the statutes of this state relating to divorce has not yet been judicially determined, the statutes now existing upon the subject having been in force only since 1883.

"A statute of this sort ought to be, and commonly is, construed in harmony with the unwritten law. Within this principle, most of the statutes creating a jurisdiction to give divorce for cruelty are interpreted to mean, simply and only, the cruelty which was the ground for divorce from bed and board in England when our country was settled." 1 Bishop on Mar. & Div. § 718. (6th ed.)

"The general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they have to soften, by mutual accommodations, that yoke which they know they cannot shake off; they become good husbands and wives from the necessity of remaining husbands and wives." *Evans v. Evans*, 1 Hagg. Con. 35.

This passage was cited by the court in the case of *Bailey v. Bailey*, 97 Mass. 373, 380, as expressing the views under the influence of which the Massachusetts statute on the subject was passed, the general spirit of which is the same as that of the law of 1883, which we are considering.

The same views are stated at a little more length in the note to

the case of *Morris v. Morris*, 73 Am. Dec. 619 to 631, as the rule to be reduced from all the cases, as reviewed by the annotator, said note being the latest review of the authorities on the subject which we have been able to find.

Divorces are to be granted on the ground of cruelty, or cruel and abusive treatment, if at all, not as punishment for offences committed, but as a protection against future probable acts of cruelty, this probability being based upon the former conduct, and the character and disposition of the parties. Note to *Morris v. Morris*, 73 Am. Dec. 622; 1 Bishop on Mar. & Div. § 719.

All the circumstances together must be taken into consideration; for the question is, not whether this or that fact alone would render it the duty of the court to pronounce for the separation, but whether all the facts combined ought to lead to that result. 1 Bishop on Mar. & Div. § 747.

In England and most of our states, the doctrine, to which not an exception could easily be found, is abundantly established, that the apprehended harm must be bodily, in distinction from mental suffering. 1 Bishop Mar. & Div. § 722.

There are some cases decided by the courts of some of the western states that go farther than this, but they are cases which we think this court is little likely to follow. These cases are referred to in the note to *Morris v. Morris*, before cited, as giving a new definition to the term cruelty, and as not being sustained by the cases they refer to as sustaining cases. See 73 Am. Dec. 622.

All the authorities concur in holding that the causes of complaint which can justify a divorce must be grave and weighty, and that courts should exercise much caution and discrimination in granting divorces. *Barrere v. Barrere*, 4 Johns. c. 187, 189. 1 Bishop on Mar. & Div. § 743.

The court has no longer discretionary powers in the matter of divorce, the legislature having substituted for such discretionary powers certain stated causes, as before suggested, hence the doctrine of *Huston v. Huston*, 63 Maine, 184, is no longer applicable.

The libel does not disclose any attempt on the part of the

libellant to disabuse the mind of the libellee of the suspicions that evidently had in some way been instilled therein.

The libel does not show that the libellee's occupying a different bed by herself was not by his express request, or in consequence of his own conduct, or that he ever requested her to do otherwise; it does not disclose any attempt on his part to make any use of the weapons of kindness and civility towards her, the wife of his choice; it does not show that he any way attempted to regain her affection, to persuade to more gentle ways; or that he so much as attempted to reason with her before filing the libel and preparing to drag his domestic infelicities into the light of publicity.

The libel does not show how, by what management, acts, language, deportment, and treatment of him, the libellee endeavored to estrange the children from him, nor does it state that the attempt was successful as to either child. It does not disclose how his health was affected, whether favorable or unfavorably, or to what extent; it does not state whether such effect was lasting or temporary.

If we assume that the libellant intended to charge that she withheld from the marital connection, and did so without just cause, though we admit nothing of the sort, and we do not accept a possible intention to allege, for an adequate allegation, no sufficient cause for divorce would then be alleged. *Cowles v. Cowles*, 112 Mass. 298; 1 Bishop on Mar. & Div. § 338, and cases cited.

The effect upon the health, or the apprehended danger must be adequately serious; it is not every slight and transient effect, even if it be physical, which will justify the extreme remedy for divorce. 1 Bishop on Mar. & Div. § 717.

All the cases concur in holding that the apprehension of danger must be reasonable, or, as Lord STOWELL stated it in *Evans v. Evans*, before cited, "it must not be an apprehension arising merely from an exquisite and diseased sensibility of the mind."

In considering this case we ask the court to compare the acts necessarily admitted by the demurrer to this libel with the facts

proved in almost any one of the reported cases on the subject, and especially with the facts proved in the case of *Kelly v. Kelly*, Law Rep. 2 Pr. & Div. 31; S. C. on appeal same vol. 59.

HASKELL, J. The General Court of Massachusetts, by act of March 16, 1786, § 3, enacted, "that divorce from bed and board may and shall be granted for the cause of extreme cruelty in either of the parties." To this act was added by act of 1810, c. 119, two other causes for divorce, utter desertion, and the withholding of support from the wife.

The legislature of Maine, by act of February 10, 1821, Smith's laws, vol. 1. c. 71, § 3, enacted the Massachusetts statute, "that divorce from bed and board may and shall be granted for the cause of extreme cruelty in either of the parties, or whenever any husband shall utterly desert his wife, or shall grossly, or wantonly and cruelly neglect, or refuse to provide suitable maintenance for her, being of sufficient ability thereto." This act was not wholly repealed until 1883.

By acts of March 3, 1829, c. 440, and of March 6, 1830, c. 456, wilful desertion for five years was added to the then few existing causes for divorce *a vinculo*, and utter desertion was omitted from the revision of 1841 as a cause for divorce *a mensa et thoro*.

By act of August 7, 1849, a divorce *a vinculo* was authorized, "when a justice of this court, in the exercise of a sound discretion, may deem the same reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society;" and by act of 1863, c. 211, § 2, the court was required to grant a divorce for three years' wilful desertion, without cause.

These enactments of our legislature remained in force, until repealed by the act of March 13, 1883, c. 212, which provided, that divorces *a vinculo* shall be decreed for (1) adultery, (2) impotence, (3) extreme cruelty, (4) utter desertion continued for three consecutive years next prior to the filing of the libel, (5) gross and confirmed habits of intoxication, (6) cruel and abusive treatment, (7) on the libel of the wife, when the husband,

being of sufficient ability, grossly, or wantonly, cruelly refuses, or neglects to provide suitable maintenance for her.

A review of this legislation shows plainly enough, that the act of 1883 was intended to limit and restrict divorce to specified causes, and to prohibit the methods touching it, that had prevailed for more than thirty years. Extreme cruelty had been a cause for divorce *a mensa et thoro* in this state, and in Massachusetts, for almost a century; and when the act of 1883 made extreme cruelty a cause for divorce, *a vinculo*, instead of *a mensa et thoro*, it may fairly be presumed that the same meaning was intended to be applied to the phrase in the new statute, that had always been adjudged to it in the old statute.

Extreme cruelty, as used in the divorce statute of 1786, was defined by the court of Massachusetts to mean, "personal violence," *Warren v. Warren*, 3 Mass. 321, and that interpretation of the statute has been adhered to by the courts of that state hitherto. *Hill v. Hill*, 2 Mass. 150; *French v. French*, 4 Mass. 587; *Ford v. Ford*, 104 Mass. 198; *Bailey v. Bailey*, 97 Mass. 373; *Lyster v. Lyster*, 111 Mass. 327. This provision after judicial construction was enacted by the legislature of Maine in 1821, and declared to be a cause for divorce, *a vinculo*, by the act of 1883, without intimation that its adjudged meaning should be changed, so that extreme cruelty, as the (3d) cause for divorce, in the act of 1883, means "personal violence," intentionally and wantonly inflicted, so serious as to endanger "life, limb, or health," or to create reasonable apprehension of such danger.

This meaning of the (3d) cause for divorce, in the act of 1883, makes plain the intention of the Legislature, in providing the (6) cause for divorce in the act to be cruel and abusive treatment; words of wider significance, and of more comprehensive meaning. This phrase does not necessarily imply physical violence, though it may include it. Words and deportment may work injury as deplorable as violence to the person. "I will speak daggers to her, but use none," says Shakespeare. Temperament and character so widely differ, that conduct cruel to one, might scarcely annoy a more callous nature. Having in

mind the sacred character of the marital relation, and its influence on the happiness and purity of society, as well as upon individuals, not overlooking considerations, that may not be freely discussed, each particular case must be judged of by its own particular facts and circumstances.

Divorce should not be a panacea for the infelicities of married life; if disappointment, suffering, and sorrow even be incident to that relation, they must be endured. The marriage yoke, by mutual forbearance, must be worn, even though it rides unevenly, and has become burdensome withal. Public policy requires that it should be so. Remove the allurements of divorce at pleasure, and husbands and wives, will the more zealously strive to even the burdens and vexations of life, and soften by mutual accommodation so as to enjoy their marriage relation.

Deplorable as it is, from the infirmities of human nature, cases occur where a wilful disregard of marital duty, by act or word, either works, or threatens injury, so serious, that a continuance of cohabitation in marriage cannot be permitted with safety to the personal welfare and health of the injured party. Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, either, is like a withering blast, and endangers "life, limb, or health," and constitutes the (6) cause for divorce in the act of 1883. Such is the weight of authority. *Bailey v. Bailey*, 97 Mass. 373; *Lyster v. Lyster*, 111 Mass. 327; *W. v. W.* 141 Mass. 495; *Evans v. Evans*, 1 Hagg. Con. 35; *Kelly v. Kelly*, 2 L. R. Prob. & Div. 31; *Kennedy v. Kennedy*, 73 N. Y. 369; *Morris v. Morris*, 14 Cal. 76; S. C. 73 Am. Dec. 615; and cases cited in note.

The case comes up on demurrer to the libel. That charges, that the libellee has for a long time refused her bed to the libellant, and has invariably slept apart from him without cause; that she has continuously charged him with infidelity without cause, and this too, in the presence of their minor children, and sometimes in the presence of their servant; that she has sought to alienate the affections of their children from him; that she has

studiously avoided his society ; that she has lost all interest in his welfare, and ceased to perform any wifely act ; that his home has thereby become so unhappy, that existence in it is insupportable, whereby his peace of mind has become so affected, as to endanger his health.

No one allegation in the libel has been held to constitute legal cruelty, save that of infidelity. That charge when falsely and maliciously made has been often held to constitute cruelty, when accompanied by acts of violence, or reasonable apprehension thereof. But few cases have been found, that hold the false charge of infidelity to be legal cruelty, and these were mostly adjudged in western states. If the legislature had intended by the act of 1883 to constitute the false charge of adultery a cause for divorce when taken by itself, it is reasonable to suppose, that it would have so named it, inasmuch as the act of adultery is declared to be such cause.

The libel charges the effect of the combined allegations to be physical injury. The demurrer is general, and does not reach a want of particularity in such allegation, so that, such effect must be considered as flowing from the preceding allegations in the libel ; nor is it a conclusion, that cannot be said to necessarily, or logically flow therefrom, because it is the averment of a fact, that may, or may not result from the conduct of the libellee charged in the libel. Here the fact is averred to exist, that of conduct which seriously injures, or threatens to injure and impair physical health. The libel is sufficient, and according to the stipulation, the libellee should answer below, where it may be determined, whether libellee's conduct, in this particular case, has so affected the libellant, as to amount to cruel and abusive treatment.

*Exceptions sustained. Libel
adjudged good.*

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

JEREMIAH HAYDEN vs. SYLVESTER H. SKILLINGS.

Somerset. Opinion November 9, 1886.

Railroads. Hay and grass growing within railroad location.

A railroad corporation has practically the exclusive possession and control of the land within the lines of its location and the authority of removing therefrom all things growing thereon, the removal of which it may deem necessarily conducive to the safe management of its road.

ON REPORT.

The opinion states the case.

Messrs. E. W. and F. E. McFadden, for plaintiff.

What is an easement? Webster defines it as "in law, any privilege or convenience which one man has of another, either by prescription or charter, without profit; as a way through his land," &c.

Bouvier defines it 1st, "To be a liberty, privilege or advantage, which one man may have in the lands of another, without profit; it may arise by deed or prescription." "This is an incorporeal heraditament, and corresponds nearly to the servitudes or services of the civil law."

"The owner of the soil has right to all above and under ground, except only the right of passage, for the king and his people." 1st J. Burrow, 133.

A private individual, under the direction of the proper officer, may lawfully cut the grass growing beside the highway, if it impedes the exercise of the right of the public to the enjoyment of the public easement. But the grass belongs to the owner of the fee, and if the person cutting it, carries it away, this renders the whole act wrongful, and the person committing it, a trespasser *ab initio*." *Cole v. Drew*, 44 Vt. 49.

"The public have no other right, but that of passing and repassing and the title to the land, and all the profits to be derived from it consistently with, and subject to, the right of

78	418
85	142
78	413
85	117

way, remain in the owner of the soil." 16 Mass. 33; 4 Mass. 429, 595; 13 Mass. 259; 1 Pick. 122; 1 Roll. Abr. 392.

The public have only an easement in a turnpike road, and the owner of the soil may maintain trespass against an individual for ploughing up the land. 1 Pick. 122; 2 Mass. 125; 6 Mass. 454; 1 Roll. Abr. 392. Railroads are public highways. 63 Maine, 276; 60 Maine, 124.

And, of course, are subject to the law of easements, as are common highways, and this easement gives them the right to build, repair and run their railroad. It gives them no further right to the soil or to the products of the soil, these still remain with the owner of the soil. Wash. on Easements, 185; 6 Mass. 454; 6 Pick. 57; 1 Burr. 133.

That the plaintiff was the owner of the soil appears by the agreed statement in the case, and as such owner he was entitled to the possession subject only to the easement. 1st J. Burrow, 133; 49 Maine, 207; 65 Maine, 124; 66 Maine, 38; 2 Mass. 127; 44 Vt. 49; 4 Pick. 244; 6 Pick. 58.

But surrounding circumstances of aggravation will materially influence the amount of charges to be recovered for a trespass upon lands. This trespass was after notice or warning not to trespass. 1 Ad. on Torts, sec. 455; 5 Taunt. 441.

But the counsel says, in his brief statement that "said land was taken by right of eminent domain for the purpose of a railroad" that is just what it was taken for, no more nor less. It was not taken to furnish feed for defendant's cow.

The law of eminent domain would not allow that. For private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Con. of Maine, Art. 1, sec. 21.

Now the public exigencies do not require that the plaintiff shall furnish hay for defendant's cow. Nor could the direction of said railroad company justify the defendant in committing a trespass upon plaintiff's land. 44 Vt. 49.

Where an entry is made under authority or license given to the party by law, and he abuses it, he becomes a trespasser *ob initio*.

E. F. Webb and *Appleton Webb* for the defendant.

Trespass was not the proper form of action. 1 Chitty, Pl. § § 139, 179; 2 Greenl. Ev. § 616; *Shaw v. Mussey*, 48 Maine, 247.

The easement of a railroad differs from that of a highway. Wash. Easements, 158; *Adams v. Emerson*, 6 Pick. 57; 104 Mass. 111; *Appleton v. Fullerton*, 1 Gray, 192; 1 Rover, Railways, *Holliday v. Davis*, 5 Oregon, 40.

A railroad company has exclusive possession within its location. Pierce, Railroads, 159; Redf. Railroads, 127; *Pitts, etc. R. R. Co. v. Jones*, 86 Ind. 496, (44 Am. R. 334;) 2 Waterman, Trespass, 677; *Hurd v. Rutland & B. R. R. Co.* 25 Vt. 116; *Weston v. Foster*, 7 Met. 297; 1 Rorer, Railroads, 414; *Henry v. Dubuque & Pac. R. R. Co.* 2 Iowa, 288; *Preston v. Same*, 11 Iowa, 15; *Blake v. Rich*, 34 N. H. 282; *Kellogg v. Malin*, 50 Mo. 496; 2 Wood's R'y Law, 770; *Conn. & Pass. R. R. Co.* 32 Vt. 43; *Kan. Cent. R. R. v. Allen*, 22 Kansas, 285, (31 Am. R. 190;) *Brainard v. Clapp*, 10 Cush. 10; *Hazen v. B. & M. R. R.* 2 Gray, 580; *Jackson v. Rut. & Bur. R. R. Co.* 25 Vt. 150; *Troy & Boston R. R. Co. v. Potter*, 42 Vt. 265, (1 Am. R. 325.)

It is the duty of the railroad company to keep the roadway clear of combustible material. *Pitts, etc. R. R. v. Jones*, 86, Ind. 496; *Salmon v. Del. etc. R. R. Co.* 9 Vroom, 5, (20 Am. R. 356;) *Kellogg v. Chicago & N. W. R. R. Co.* 26 Wis. 227 (7 Am. R. 71); *Webb v. Rome, etc. R. R. Co.* 49 N. Y. 420 (10 Am. R. 389); *Vaughan v. Taff-Vale R. R. Co.* 5 H. & N. 679; *Aycock v. Raleigh, etc. R. R. Co.* 89 N. C. 321; 1 Thompson, Negligence, 162, note 8.

VIRGIN, J. Trespass *qu. c.* by the owner of the fee for cutting and carrying away grass growing within the located limits of the land duly taken by right of eminent domain and occupied by the Maine Central railroad.

The defendant justifies, as section foreman of the railroad company, in executing the instructions of its general manager and road-master to cut and burn the bushes, grass and rubbish,

within his section, along the side of its track, to prevent fire from its locomotive spreading upon land of adjoining and adjacent owners.

It is common learning that railroads are of public convenience and necessity, and that when the corporations can not purchase the land for their location and use, they may take it by right of eminent domain on payment of the damages legally assessed therefor, which, considering the elements which enter into their estimation, is practically quite equal to the full value of the land. Hence, although such corporations are owned by private individuals, still they are denominated *quasi* public corporations, and in the land so taken they acquire an easement, an incorporeal right only, the fee still remaining in the owner of the land.

But easements are as various as the purposes to which land and buildings may be applied. They vary as to the mode and extent of occupation according to the particular use to be made of them under the authority by which they are acquired. The character and extent of easements acquired by pew owners in meeting-houses, in land flowed by mill-dams, in land taken for canals, town ways and highways, are well defined, and the respective rights of the land owners and of those having the easements, have long been settled by numerous decisions of this court, which it is needless to cite here. The mode and extent of the use necessarily "varies not only according to the exigencies of each particular kind, but to the varying circumstances of each species of public work." *Brainard v. Clapp*, 10 Cush. 10. The rights under public easements are commensurate with, and include such use and occupation as are directly or incidentally conducive to the free exercise and "full enjoyment of the franchise and the advancement of the public benefit contemplated by the public work."

It follows that the easement in lands taken for the purpose of a railroad is obviously vastly different from that in lands appropriated to the various kinds of other public ways. Its propelling power, its numerous freight and passenger trains driven at the high rate of speed demanded by the public—its absolute responsibility for damage to insurable property, real

and personal, contiguous to its lines, caused by fire communicated, regardless of all possible care on its part, by its locomotives, (R. S., c. 51, § 64,) or so communicated to materials growing and naturally being between its road and property not contiguous, and extending thereto, (*Pratt v. At. & St. L. R. R. Co.* 42 Maine, 579,) their common law and numerous statute liabilities—all require that they shall have, as means to meet these responsibilities, the fullest opportunity which the freest use, occupation and control of the land within its lines can afford, without the intervention of any acts on the part of the landowner which may tend to endanger its trains or otherwise embarrass its use of the easement for the purpose for which its charter was granted. To this end it must have, practically, the exclusive possession and control of the land within the lines of its location, and the authority to remove therefrom all things growing thereon, the removal of which it may deem necessarily conducive to the safe management of its road.

And such is the doctrine held by law writers and by numerous decisions of courts of the highest respectability in several of the states, among which are the following: *Brainard v. Clapp*, 10 Cush. 10; *Hazen v. Boston & Maine Railroad*, 2 Gray, 577, 580; *Prop'rs L. & Canals v. Nashua & Low. R. R. Co.* 104 Mass. 11, and cases there cited; *Jackson v. Rutland & Burl. R. R. Co.* 25 Vt. 150; *Conn. & P. Riv. R. R. Co. v. Holton*, 32 Vt. 43.

The precise question raised here was decided in a late case in Vermont, and in speaking for the court, Chief Justice PIERPONT said:

"If the right to remove the herbage be conceded, adjoining land owners throughout the state would be found, at the proper seasons, within the lines of the road, with their hired men, tools and perhaps teams, for the purpose of taking off the herbage, and the detriment to the railroad company and the danger to the trains and passengers would be increased a thousand fold. The men employed by the land owners would be likely to be careless, both in respect of being on the track in person, and temporarily laying their tools thereon, from which accidents might reasonably

be expected to occur, to avoid which a constant and additional degree of watchfulness would be required by the engineers having trains in charge. . . . And under the best management by the railroad company, accidents might be reasonably expected to occur from such causes. In the removal of such causes, the railroad companies and the traveling public are greatly interested. Everything which tends to increase the danger of travel upon railroads, public policy requires should be prevented if possible. A railroad company should have such sole and exclusive control of the land within the lines of its road as shall enable it so to keep it as to exclude all probability of any accident resulting from any outside interference with such possession."

The grass could have been of but slight value to the plaintiff; but whether it was worth what he estimated it or what the defendant testified, or whether it was harvested or burned on the ground, is immaterial.

Judgment for the defendant.

PETERS, C. J., DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

JOHN McNAMARA and another

vs.

DENNIS A GARRITY and another.

Kennebec. Opinion November 9, 1886.

Arrest on mesne process. Affidavit.

To justify the arrest on mesne process of one of the joint debtors, the affidavit need not contain the pronoun in the singular form, the plural form is sufficient.

. On exceptions from superior court.

This was an action of debt, on bond, purporting to be given in accordance with R. S., c. 113, § 15, commonly called a "fifteen day" bond.

At the trial the defendants introduced in evidence the affidavit attached to the original writ, in words and figures, as follows:

"State of Maine.

"Kennebec, ss.

Hallowell, Sept. 6, 1883.

"Then personally appeared Herbert Blake, attorney, the within named creditor, and made oath that he has reason to believe, and does believe, that the within named debtors are about to depart and reside beyond the limits of the state, and take with them property or means of their own, exceeding the amount required for their immediate support, and that the demand sued for, or the principal part thereof, amounting to at least ten dollars, is due to the within named creditor.

Herbert Blake,

Attorney for creditor."

Duly sworn to.

The defendants requested the justice presiding to rule, as a matter of law, that the affidavit was insufficient in law to authorize the sheriff, under the request of plaintiffs, to arrest the defendant, Garrity, in the original suit. The requested ruling was refused, and the presiding justice ruled that the affidavit was sufficient in law to authorize the arrest of said Garrity, by virtue of which the bond in suit was given.

To this ruling the defendants alleged exceptions.

H. M. Heath, for the plaintiffs.

Loring Farr, for the defendants.

Though the action be joint, the service of the writ is several and distinct. One service may be by arrest, and the other by summons and attachment. No person can be arrested in an action on contract, on mesne process, unless the affidavit allege specifically and unequivocally that *he* is about to depart from the state, etc., with property or means of *his own*, and take with him property or means of *his own*, exceeding the amount required for his immediate support. Nothing should be left to inference. *Proctor v. Lothrop*, 68 Maine, 256, and cases there cited. *Stare decisis*.

VIRGIN, J. Of the several questions raised by the bill of exceptions, the only one relied on and argued by the defendants' counsel, relates to the sufficiency of the affidavit, wherein the

plural forms of the pronouns were used, although only one of the debtors was arrested.

In 1851, the same question was raised, but the court considered it too technical and adjudged the affidavit sufficient. *Stare decisis*. *Cates v. Noble*, 33 Maine, 258.

Exceptions overruled.

PETERS, C. J., DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

STATE vs. SILAS W. MCLOON.

Knox. Opinion November 9, 1886.

Drunkenness. R. S., c. 27, § 48. St. 1885, c. 366, § 6.

A complaint founded on R. S., c. 27, § 48 as amended by St. 1885, c. 366, § 6, simply alleging the name of the town in which the defendant was intoxicated and disturbing the public peace, is not sufficient on demurrer.

ON EXCEPTIONS by the defendant to the ruling of the court in overruling a demurrer to the following complaint :

"State of Maine. Knox, ss. To the judge of our police court for the city of Rockland, in the county of Knox :

"A. J. Crockett of Rockland, in said county of Knox, on the tenth day of April, in the year of our Lord one thousand eight hundred and eighty-five, in behalf of said state, on oath complains that Silas W. McLoon of Rockland, in the county of Knox, laborer, on the ninth day of April aforesaid, at Rockland aforesaid, in the county aforesaid, did voluntarily drink intoxicating liquors to excess, and was then and there guilty of drunkenness by said voluntary use of said intoxicating liquors, and was then and there found and seen drunk and intoxicated and disturbing the peace of the public, against the peace of said state, and contrary to the form of the statute in such case made and provided.

"Wherefore, the said complainant prays that the said respondent may be apprehended and held to answer to this complaint, and dealt with relative to the same, as law and justice may require.

"Dated at Rockland aforesaid, this tenth day of April, in the year of our Lord one thousand eight hundred and eighty-five.

(Signed.)

A. J. Crockett."

True P. Pierce, county attorney, for the state.

Robinson and Rowell, for the defendant.

VIRGIN, J. The complaint is based on R. S., c. 27, § 48, as amended by St. 1885, c. 366, § 6, which creates two classes of offences: (1.) "Being found intoxicated in any street or highway;" and (2.) "Being intoxicated in one's own house, or in any other building or place, becoming quarrelsome, or in any other way disturbing the public peace, or that of his own or any other family."

The complaint sets out neither of these offences. The "place" in which the defendant was alleged to have been found intoxicated is not specified. It is not sufficient to allege simply that he was found intoxicated in Rockland, without specifying whether in the street, highway, building, or other particular locality.

The clause "and if found guilty of being intoxicated as aforesaid," was substituted by the legislature in the revision of 1883, for the phrase (found in the original statute of 1858, c. 33, § 26, and retained in all of the amendatory statutes of 1874, c. 255, 1880, chaps. 228 and 247) "and if found guilty of being intoxicated in the streets or highways, or of being intoxicated in his own house, or any other building or place, and becoming quarrelsome and disturbing the public peace." So that merely being found intoxicated otherwise than in the public or private places enumerated is not an offence in this state.

*Demurrer sustained. Complaint
adjudged bad.*

PETERS, C. J., DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

INHABITANTS OF VINALHAVEN vs. INHABITANTS OF LINCOLNVILLE.

Knox. Opinion November 9, 1886.

Paupers. Pauper supplies. Rent.

Where a tenant at will whose rent was payable monthly at the end of each month, neglected to pay for January and February, and on March 21 the landlord threatened immediate expulsion unless he then paid for the three months; and thereupon, at the tenant's request the overseers of the poor paid it. *Held* that all the rent thus paid was simply the debt of the tenant and not pauper supplies.

ON REPORT of facts agreed.

An action for alleged pauper supplies which the plaintiff town claims to have furnished one Sylvanus Richards and family.

The following is a copy of the letter from the pauper to the overseers referred to in the opinion. Other facts are stated in the opinion.

"Vinalhaven, March 21, 1884.

"Mr. L. W. Smith, Sir:—I give Joseph Lane order on the selectmen of this town for three months' rent from the first of January up to the first of April one 1.50 cts. a month, and don't you pay them any more than the 3 months' rent, for I can pay my rent after that myself.

From S. Richards."

To L. W. Smith."

C. E. Littlefield, for plaintiffs.

A house to live in is one of the necessities of life. *Lee v. Winn*, 75 Maine, 467.

The pauper knew he was receiving it as a pauper supply for he gives a written order therefor. He was in need, and was unable to pay either what he owed for rent or for the month of March and this appears by the order, and the investigation and determination of the overseers. This covers the whole ground—actual need—application for supplies—furnishing by the overseers as such and payment by them.

Whether or not these were pauper supplies is a question of intention. It is the intent with which they are received and

furnished that gives to the supplies their legal character. *Veazie v. Chester*, 53 Maine, 29.

The rent for March was a necessary, not then furnished but in the process of being furnished, and was actually furnished by the plaintiff and at the request of the pauper.

If rent is a proper subject for pauper supplies — a necessary for a man with a family — we do not see how it is possible for this rent for March to be held as other than pauper supplies, furnished the pauper — Richards.

J. H. Montgomery, for the defendants, cited: *Sohier v. Eldridge*, 103 Mass. 345; *Dexter v. Phillips*, 121 Mass. 180; *Robinson v. Deering*, 56 Maine, 357; *Windham v. Portland*, 23 Maine, 412.

VIRGIN, J. The alleged pauper was to pay \$1.50 per month payable at the end of each month. The rent for January and February was due and unpaid. On March 21, the landlord demanded payment of the rent due for January and February and also for March (not due till ten days thereafter) or immediate expulsion from the tenement. Thereupon the tenant drew an order for the rent of the three months on the overseers, which they, after ascertaining the tenant's destitution, paid. Did this rent constitute pauper expenses recoverable of the town in which the tenant had his settlement?

Although the letter of March 21, sent to the chairman of the overseers was a sufficient application (under R. S. c. 24, § 2), and a house to live in is a proper element of pauper relief (*Lee v. Winn*, 75 Maine, 465), still we think the payment of this rent under the circumstances by the plaintiffs' overseers was not such a relief as is contemplated by the statute.

The payment by a town of the debts of one however destitute even at the debtor's request, cannot constitute the furnishing of of pauper supplies. The payment of rent by the plaintiffs was simply payment of the pauper's debt. The tenancy was one at will created by a contract between the pauper and his landlord. The credit for the rent was given to the tenant. Rent for January and February was overdue and no one liable therefor

except the tenant. He had occupied two-thirds of March and was alone liable for the whole month, when he was threatened with unlawful expulsion unless he then paid the overdue rent as well as that which would not be due until ten days thereafter. No rent could then be collected for March as "it could not be apportioned in respect of part of the time," (*Clients' Case*, 10 Coke) although the tenancy was one at will. *Robinson v. Deering*, 56 Maine, 357.

Instead of a tenement, suppose a grocer had, in accordance with an agreement, delivered to the pauper a barrel of flour a month payable at the end of each month. And on March 21, demanded payment of the three barrels, or the removal from the pauper's possession the remainder of the unused barrel. In such case, the flour would be furnished on the credit of the pauper and become his on delivery. No part of the last barrel could be lawfully taken from him. Payment by the town, on the request of the pauper, would be nothing less than payment of his individual debts, and not in any legal sense the furnishing him with pauper supplies. The whole expense had been incurred by the pauper and none by the town. *Windham v. Portland*, 23 Maine, 412.

Plaintiffs nonsuit.

PETERS, C. J., DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

EBENEZER I. NUTTER and others vs. STEPHEN TAYLOR and others.

Oxford. Opinion November 30, 1886.

Referees. Practice. View. Objections to report. Exceptions. Surveyor. Costs.

When objections to the report of referees are based upon facts outside the record, the alleged facts must be proved to the court to sustain the objections to the report. Exceptions to the ruling of the court upon such objections must show that the alleged facts were proved.

An agreement as to the manner and place of hearing by referees, appointed by rule of court, is not binding, if it was not entered of record or embraced in the rule. When the parties do not agree upon the time and place of hearing the referees may determine the same.

Where the question before referees relates to real estate they may or not in

their discretion view the premises, and their determination, honestly made in regard to the necessity of a view, is final.

Regularly it is for the court and not the referees to fix the compensation of a surveyor, appointed by the court in the case. But where the referees allow the charges of the surveyor, that part of their report will not be rejected, when there is no suggestion that the charges thus allowed were unreasonably large in amount.

ON EXCEPTIONS.

An action of trover to recover the value of certain spruce trees.

The opinion states the essential facts upon the questions presented by the exceptions.

D. R. Hastings and David Hammons, for the plaintiffs.

Bisbee and Hersey, for the defendants.

Morse, in his work on Arbitration, page 436, says: "If an arbitrator unreasonably refuses to hear a competent witness, it is such gross misconduct as to vacate the award for such refusal is against natural justice."

By the thirty-second rule of this court, the defendants had an undoubted right to be heard on the question of costs and on allowing any portion of the surveyor's bill. The defendants had a right to inspect the items, and to object in open court to any portion or all, but were deprived of that right, as the referees took it out of the hands of the court and allowed a gross sum. 48 Maine, 409.

The referees had no right to include said surveyor's bill in their award. Their action in so doing is a clear excess of their power, and such an excess of power as makes it the plain duty of this court to examine into the same and reject said report. 48 Maine, 546-7.

It is insisted that the defendants must fail because they furnished no proof of the facts upon which they rely. But it would seem that the judge ruled the facts immaterial. It must be understood that the defendants were to establish the facts asserted in their motion, and that they would have done it, if, in the opinion of the presiding justice, it would have been of any avail. The plaintiff, if he denied the existence of the alleged

facts, should have contested them, if the judge would have permitted it, and then, if the defendant failed in his proofs, the report would have been accepted without objection. *Black v. Hickey*, 48 Maine, 545.

LIBBEY, J. When the report of the referees was offered in court for acceptance, the defendants filed their objections thereto in writing, assigning three reasons therefor. The objections were overruled and exceptions taken.

The first objection is, in substance, that prior to the commencement of the action, the reference was agreed upon by two of the plaintiffs and one of the defendants, that a part of the agreement was that the "referees, in determining the same," (the case) "should view the premises and hear the parties at Byron," and that the defendants were induced to agree to refer by the agreement as to view and place of hearing. They allege that after the rule was delivered to the referees, the plaintiffs refused to carry out this part of the agreement, and that the referees to whom the question was submitted, appointed and held the hearing at Bethel. They further allege that the referees did not view the premises, although they requested them to do so.

This objection is based on alleged facts outside of the record, and to sustain the exceptions to the ruling of the court, the case should show that the facts were proved or admitted. Neither appears, nor does it appear that any evidence was offered. We think this is a good answer to the exception on this point.

But assuming that the facts were proved as alleged, we think the ruling right. The agreement was executory; it was made before the action was commenced. It was not brought to the knowledge of the court when the reference was entered, but the reference was entered of record without regard to it. If the defendants wished to avail themselves of its benefits, it should have been entered of record, and embodied in the rule, that the action of the referees might be governed by it. In the absence of it, it was the duty of the referees, if the parties did not agree, to fix the time and place of hearing. It was also their duty, after hearing the evidence and the parties, to determine whether

a view was required, or would give them further light in regard to the merits of the case. In the absence of fraud or improper conduct on the part of the referees in discharging those duties, their determination is final and conclusive. No fraud or improper conduct on the part of the referees is alleged or claimed in argument.

The second objection is, that the evidence was not sufficient to prove a joint conversion by the defendants. This was an issue for the determination of the referees, and their decision is final.

The third objection is, that the referees awarded that the plaintiffs recover the amount paid the surveyor for his services and expenses in surveying the lines in dispute for the parties. He was appointed and commissioned by the court for that purpose. Regularly his compensation should be fixed by the court, after the return of his commission, and taxed as a part of the costs of court. But it was in the power of the referees to award in regard to the costs of court, (R. S., c. 82, § 120,) and they have stated in their report the amount awarded as paid the surveyor, in separate items. This part of the award might have been rejected without affecting the rest of it, if it had been alleged or claimed that the amount allowed was excessive; and the amount would then have been fixed by the court. But there is no suggestion that the amount allowed is excessive. If it is not, and was paid by the plaintiffs, it is immaterial whether it be fixed by the court or determined by the referees. It does not appear that the defendants were aggrieved by the ruling on this point.

Exceptions overruled.

PETERS, C. J., WALTON, DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

MELISSA A. ANDREWS vs. MELZER T. DYER and another.

Knox. Opinion November 29, 1886.

Deed. Name of grantee. Presumption.

In a real action the plaintiff, Melissa A. Andrews, claimed title under a deed from her deceased husband running to Mercy A. Andrews. The court

instructed the jury as follows: "Now was the deed made to her and delivered to her as her deed? She has it and produces it here, and the presumption, therefore, is that it was delivered to her." *Held*, error.

ON EXCEPTIONS.

The opinion states the case.

C. E. Littlefield for plaintiff.

It is immaterial that there is a mistake in the christian name if the deed explains who is intended. A deed to Robert Bishop of E, will be good, though his real name is Roland. 3 Washburn, Real Property, 265.

"A grant therefore to Henry Earl of Pembroke where his name is Robert, is good." *Hall v. Leonard*, 1 Pick. 30.

In *Scanlan v. Wright*, 13 Pick. 523, Eliza A. Scanlan claimed, under a deed to Eliza A. Castin, and the court held that it was competent to show that she was the person to whom the grant, was made.

"When taking the name and addition together, the deed fully applies to neither, it falls within the rule of a latent ambiguity, and hence a deed to Hiram Gowing, cordwainer, was held to be a deed to Hiram G. Gowing, cordwainer, and not a deed to Hiram Gowing, his son, who was not a cordwainer." *Peabody v. Brown*, 10 Gray 46.

A latent ambiguity, as to the grantee, opens the case for explanatory parol evidence. *Kingsford v. Hood*, 105 Mass. 496; *Simpson v. Dix*, 131 Mass. 184. Or as to another operative part of the deed, as a monument. *Tyler v. Fickell*, 73 Maine, 415.

Evidence that the name of a payee was erroneously written in an order is admissible. *Jacobs v. Benson*, 39 Maine, 132.

So parol evidence would be admissible to prove that George Houseman and George Hosmer, are the same person. *Jackson v. Hart*, 12 Johns. 84.

So here to show, inasmuch as there is no Mercy A., that Mercy A. is really Melissa A. *Vide Jackson v. Cody*, 9 Cowan, 142.

This principle is sustained by the best elementary writers. 1 Green. Ev. (13 ed.) § 291, 7; Whar. Ev. §. 953-4; Best

Ev. § 226 ; 1 Jar. Wills, 260, and note. See also, *Scofield v. Jennings*, 68 Ind. 282 ; *Molberly v. Molberly*, 60 Mo. 376 ; *Ferrill v. Hunt*, 68 Ga. 132.

The cases of *Crawford v. Spencer*, 8 Cush. 418, and *Whitmore v. Learned*, 70 Maine, 283, are undoubtedly relied upon by the defendant. They are precisely alike but are entirely unlike the case at bar.

The general principle upon which the case turns was correctly stated by the court. If any of the illustrations used in the charge go beyond this rule, they also go beyond the necessities of, and are not applicable or necessary to the case, and defendants are not aggrieved by them, and have no right of exception therefor. *Kilpatrick v. Hall*, 67 Maine, 543 ; *State v. Pike*, 65 Maine, 111.

True T. Pierce, for the defendants, cited upon the point that parol evidence could not be received to contradict, vary or explain instruments in writing :

Linscott v. Fernald 5 Maine, 496 ; *Lincoln v. Avery*, 10 Maine, 418 ; *Hancock v. Fairfield*, 30 Maine, 299 ; *Chandler v. McCard* ; 38 Maine, 564 ; *Madden v. Tucker*, 46 Maine, 367 ; *Rogers v. McPheters*, 40 Maine, 114 ; *Wellington v. Murdough*, 41 Maine, 281 ; 2 Whart. Ev. 920 ; 1 Greenl. Ev. 275 ; 1 Best, Ev. 421 ; *Hall v. Leonard*, 1 Pick. 27 ; *Crawford v. Spencer*, 8 Cush. 418 ; *Peabody v. Brown*, 10 Gray, 45 ; *Simpson v. Dix*, 131 Mass. 179 ; *Jackson v. Foster*, 12 Johns. 488 ; *Miller v. Chriddendon*, 2 Iowa, 315 ; *Brown v. Brown*, 66 Maine, 316.

Plaintiff's remedy is in equity. R. S., c. 77, § 6, cl. 4 ; *Adams v. Stevens*, 49 Maine, 362 ; *Farley v. Bryant*, 32 Maine, 474.

LIBBEY, J. This is a writ of entry. The plaintiff, whose name is Melissa A. Andrews, claims title to the demanded premises by virtue of a deed from James Andrews, her husband, to Mercy A. Andrews, dated July 3, 1875.

The defendants claim the possession of the premises under a lease from James Andrews.

The plaintiff claims that the discrepancy in the name of the

grantee in the deed, arose from a mistake made when the deed was written, that she is, in fact, the grantee, and that it was delivered to her, as the grantee, by the grantor.

On the other hand, the defendants claim that James Andrews did not intend to convey to the plaintiff, that the difference in the name was intentional on his part, and that he never delivered the deed to her to take effect as his deed to her. There was evidence tending to support the position of each side.

On this point the court instructed the jury as follows: "Now was the deed made to her and delivered to her as her deed? She has it and produces it here, and the presumption, therefore is, that it was delivered to her."

We think this was error. True, it is well settled, that, in the absence of any evidence or circumstances to the contrary, the production of the deed by the grantee is *prima facie* evidence of its delivery. 2 Green. Ev. § 297; *Maynard v. Maynard*, 10 Mass. 456; *Hatch v. Haskins*, 17 Maine, 391.

But this rule prevails only when the deed is produced by the grantee. Here, by the deed alone, the plaintiff does not appear to be the grantee. It can only be made to appear that she is by evidence *aliunde*. The rule given to the jury by the court, required them to find that the deed was delivered to the plaintiff, as her deed, without evidence, identifying her as the grantee. If the instruction had required the jury to find that she was, in fact, the grantee, before they could infer a delivery to her from the production of the deed by her, it would have been correct, but to make out a *prima facie* case she was required only to produce and put in evidence the deed from James Andrews to Mercy A. Andrews. This was, undoubtedly an inadvertence of the presiding justice, but it was calculated to mislead the jury. We know of no authority to sustain it.

Exceptions sustained.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER and HASKELL, JJ., concurred.

HORACE E. BUCK, executor, vs. MARY F. RICH.

78	431
88	443

Penobscot. Opinion December 7, 1886.

Executors and administrators. Evidence. Deposition. When an executor is a nominal party. Contract. Trover.

The deposition of a defendant is not admissible where the plaintiff is an executor.

An executor can be shown to be a nominal party by the probate records only, in an action of trover by him to recover the value of certain personal property belonging to the estate.

Testimony may be excluded as immaterial when its sole office is to strengthen or give credit to other testimony, such other testimony being legally inadmissible.

An agreement acknowledging the possession of personal property claimed by another and promising to "keep said property free of expense" to the other, "and to deliver to him on demand such . . . as I admit to be" his property, and to keep the balance "until such time as the question of title is settled," will not prevent such other person from maintaining trover for the same after demand and refusal.

ON EXCEPTIONS.

Trover for the wrongful conversion of certain articles of furniture, clothing and jewelry, alleged to have been the property of the deceased, Susan H. Buck. The plaintiff was the husband of the deceased, and executor of her will; the defendant was the mother of the deceased.

The defendant admitted that the property was at one time the property of the deceased, and also admitted a demand and refusal; but claimed that the deceased gave the same to her (the defendant) after her will was made.

The following is the agreement of October 11, 1882, referred to in the opinion.

"Bangor, Oct. 11, 1882.

"I hereby acknowledge that I have in my possession the following described personal property claimed by Horace E. Buck, as administrator of the estate of Susan H. Buck, late of Bangor, deceased.

(Here follows a list of articles sued for.)

"The above property has been in my possession since the

decease of Mrs. Buck, and there being some questions as to the title of a part or whole of it, (I claiming a portion of it as mine) I hereby agree to keep said property free from expense to said Buck, and to deliver to him on demand such of the above described property as I admit to be the property of the estate, and that the balance I will keep until such time as the question of title is settled, and then I will deliver to him on demand such articles as are found to be the property of the estate. It being distinctly understood that by this instrument I waive no right whatever, but reserve all title to any of the above described property which I now possess.

Mary F. Rich."

Barker, Vose and Barker, for the plaintiff, cited: R. S., c. 82, § 98; *Brooks v. Goss*, 61 Maine, 307; *Drew v. Roberts*, 48 Maine, 35; *Brown v. Haynes*, 52 Maine, 578; *White v. Brown*, 67 Maine, 196; *Wing v. Andrews*, 59 Maine, 506; *Neal v. Hanson*, 60 Maine, 84; *Crocker v. Gullifer*, 44 Maine, 491; *Dickey v. Franklin Bank*, 32 Maine, 572; Cooley on Torts, 450.

A. W. Paine, for defendant.

"Nominal" is the opposite or reverse of real, and is the proper designation of a person having no actual interest as such in the matter at issue. As applied at law, it describes a person whose name alone is used for the benefit of another, in whom the actual right is vested. The very derivation of the term from its latin, "*Nomen*," of course shows this. It is only in his representative character that he is to be "nominal," for such is the express language of the statute. If he is using the executor character for his own private purpose alone, he is in the same condition as any other person would be who borrowed his official authority to enforce a claim which was incurred in the name of the testator and had by him been assigned, or one to whom a non-negotiable chose in action had been sold by the executor. 71 Maine, 72; 12 Allen, 133; see *Farnum v. Virgin*, 52 Maine, 576; *Drew v. Roberts*, 48 Maine, 35.

In *Wing v. Andrews*, 59 Maine, 504, an altogether different statement of facts appeared, making necessary the exclusion under

the state of facts existing. For other cases see *Nash v. Reed*, 46 Maine, 168; *Millay v. Wiley*, 46 Maine, 230; *Wentworth v. Wentworth*, 71 Maine, 72; *Rawson v. Knight*, 73 Maine, 340; *Kelton v. Hill*, 59 Maine, 261; *Buck v. Spofford*, 31 Maine, 36; *Ela v. Edwards*, 97 Mass. 318; *Brooks v. Tarbell*, 103 Mass. 496.

Under the conditions presented by the offered testimony, in connection with the express terms of the will, the plaintiff, as husband of testatrix, is made devisee of her whole estate. All her real estate, for she had none except that in Bucksport, as per inventory, was devised to him specially. All her personal estate, to the extent of five thousand dollars, is also given to him. And by the evidence offered there were no debts. Funeral charges are his to pay anyhow. *Staples' appeal*, 52 Conn. Am. Law Reg. January, 1886, p. 77.

When the executor or administrator is one with the heir or devisee, as in the case here, he would in such case hold the property in trust for his own benefit. In his personal character the legal title is in him, and in his probate or representative character he is trustee. He is thus trustee and *cestui* combined, in which case the two merge and he is the legal owner. The doctrine of merger is very common and well sustained by authority. 1 Perry on Trusts, § 347; Hill on Trustees, 252; *Hopkinson v. Dumas*, 42 N. H. 306.

Lord MANSFIELD said, "The moment both meet in the same person there is the end of trust." Doug. 778; *Gardner v. Astor*, 3 John. Ch. 53; *Starr v. Ellis*, 6 Johns. Ch. 393; Hilliard on R. P. c. 24, § 27; 2 Washburn, R. P. 203; see further *Earle v. Washburn*, 7 Allen, 95; *Carter v. Bank*, 71 Maine, 448; 2 Jar. on Wills, (5 Am. ed.) 406, 435-6, 449, 617, 372-4; *Eldridge v. Eldridge*, 9 Cush. 516-19; Dicey on Parties, 234, (216); *Barrett v. Barrett*, 8 Green. 346.

Until the preliminary steps had been taken by the plaintiff to obtain the defendant's option, or the settlement of the dispute, no wrong is done, no tortious act performed, which will authorize

any action of tort, trover or trespass, for until then she is protected by her agreement.

In the case of *Small v. Thurlow*, 37 Maine, 504, the same kind of a case was presented and the court held, of course, that no action would lie until these preliminary steps had been taken.

In a recent case reported in the Law Register for January, 1886, brought on a contract to purchase and pay for a certain piece of machinery which the plaintiff then put into defendant's mill, "warranted satisfactory in every respect" to the defendant, a very elaborate discussion of this whole subject by court and editor, is entered into. The question of "satisfactory" or not, was, by the agreement, to be settled by the defendant. Plaintiff claimed that if it was of a character which was reasonably good and "ought to be satisfactory," that was enough, and plaintiff might recover, and so thought the court at *nisi*. The full court, however, decided otherwise, and made necessary the proof that it was actually satisfactory to the party, however unreasonable he might be, for by the contract he alone was to decide that question. *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136; *Zuleski v. Clark*, 44 Conn. 218; *Man'f'g Co. v. Brush*, 43 Vt. 528.

The suit should have been in assumpsit instead of trover, on the contract, and not that until all the conditions of the contract had been complied with. *Bicknell v. Hill*, 33 Maine, 297.

The exact case in principle with this at bar is *Briggs Iron Co. v. N. A. Iron Co.* 12 Cush. 114, where A took iron ore from B's land, the title of which was in dispute; A gave bond to B to pay for the said ore if finally decided to be B's property. B, after the title was decided in his favor, sued A in trover for the ore and the court held the suit not maintainable, as the right of action to recover for the ore was on the bond.

Until the terms of the agreement were complied with and while the agreement was in force, it operated to give defendant a right to possession, and during such possession trover would not lie. Such was the case of *Fairbank v. Phelps*, 22 Pick. 535, which is very like the case at bar. The same principle is supported by Greenleaf in 2 Green. Ev. § 640. 1 Add. on

Torts, last ed. § 647, p. 483; *Bassett v. Bassett*, 112 Mass. 99; *Winship v. Neale*, 10 Gray, 382; *Barnes v. Taylor*, 29 Maine, 514.

DANFORTH, J. This is an action of trover to recover the value of certain personal property claimed to have been owned by the plaintiff's testatrix at the time of her death. The admissions by the defendant make out a *prima facie* case for the plaintiff; but the defence is a gift of the property after the execution of the will.

The case is before us upon exceptions to certain rulings of justice presiding at the trial.

To prove the alleged gift, the deposition of the defendant was offered. This was objected to and was excluded. The defendant not denying the correctness of this ruling under the general provisions of R. S., c. 82, § 38, claims that the deposition is admissible by reason of the third exception under that section, on the ground that the plaintiff, as executor, as representative of the estate, is a nominal party only. To show this, the will and inventory, which are in the case are relied upon, and testimony was offered to prove, that at the decease of the testatrix, she was entirely free from debt, and that no liability existed against her estate at any time; that she was buried under the direction of her husband, the plaintiff, and that the monument provided for in the will had already been erected without any expense to the plaintiff or the estate. This testimony, on objection, was excluded and the deposition still refused admission.

The kind of testimony offered does not appear, but whatever it was, it was incompetent. It was clearly not the probate court records, and that is the only evidence provided by law as competent to prove the settlement of an estate, especially the outstanding debts. Who is to be the judge as to the existence of debts? If any are claimed, an issue may be involved, in which the parties interested are entitled to be heard, and in this very case, there are legatees who would be entitled to a hearing upon whatever account the executor might render.

Nor would the testimony be sufficient if received. The inventory is far from being conclusive as to the amount of property belonging to the estate, and upon this, too, the legatees would have a right to be heard before the probate court. Then the will, which is relied upon as the foundation of the defendant's claim, does not give this specific property to the plaintiff. The legacy is not a specific, but a general one of a given sum of money. The plaintiff was not therefore, by virtue of the will, or when coupled with the fact that his legacy was more in amount than its value, the owner of this particular property. A portion or all of it might be needed to pay the expenses of administration. The law requires that he should account for it to the probate court. True, he is interested personally and may, either as expenses of administration, or by virtue of his legacy, in the end, receive the whole. He may possibly violate the law and appropriate it without a settlement of the estate and find no one sufficiently interested to call him to account. But this would not change the law or the fact that in the management of this property, he is acting for, and is the representative of the estate. It may be that he might have maintained this action in his own name, but if so, it would be by virtue of his special title as executor, and not as general owner, and even then he would be under a legal obligation to render an account for the proceeds. He would hold such proceeds under the same trust as the property itself. He is not, therefore, a nominal party within the meaning of the law. *Wing v. Andrews*, 59 Maine, 508; *Brooks v. Goss*, 61 Maine, 314.

The testimony offered to prove the manner in which the defendant and the testatrix and her husband had lived, and the situation of the property in question, might have been admissible as tending to give credit to the defendant's deposition or other testimony, tending to prove the alleged gift, if any such had been in the case; but as the deposition was properly excluded and there was no such other testimony in the case, this also was properly excluded. It was not competent for the jury to consider, as bearing directly upon the gift, and certainly it would not authorize a verdict for defendant.

The defendant put in the written instrument of October 11, 1882, and claimed that, by itself alone or as supported by the evidence offered, it was a defence to this action.

This defence rests upon two grounds. First that the action was prematurely commenced, and second, if any action could be maintained, it should be in *assumpsit* and not *trover*.

The first point is attempted to be sustained by an alleged agreement in the writing, that the property, except such as the defendant should acknowledge belonged to the estate, should remain in her possession until the title should be settled, and then, and not until then, is there any promise on her part, to deliver the property and only such as shall be found to belong to the estate. The claim is that the title to the property is to be settled as a condition precedent to any action for it or its value. If this is a condition binding upon the plaintiff to be performed by him, however unreasonable it might be, the argument of counsel and the authorities cited by him, would be entitled to grave consideration, perhaps decisive of the case.

But if this part of the writing is to have the force of a contract, it is still not a condition to be performed by the plaintiff alone. The obligation at best, is mutual, resting equally upon both parties. It can hardly be supposed that one party can settle a disputed title. Still if it is a binding contract it would preclude this or any other action for the purpose of settling the title. That must be done in some other way, what way is not provided for, but as it cannot be by litigation, it must be by mutual agreement or arbitration, which involves a mutual agreement. Giving then this writing the force contended for, it has the effect not only to oust the court of its jurisdiction, but is a contract which either party may obey or disobey at his election. In fact no contract at all, as has been many times decided by different courts, upon which the decisions have been uniform. *Robinson v. Ins. Co.* 17 Maine, 131; *Hill v. More*, 40 Maine, 515; *Stevenson v. Ins. Co.* 54 Maine, 55; 2 Parsons on Contracts, 707, and cases cited.

But if valid, the defendant could avail herself of it in defence only by plea in abatement, as in *Small v. Thurlow*, 37 Maine,

504. By setting up title in herself she must be considered to have waived it.

We think, however, that by a proper construction of the writing, even by its terms, no obligation whatever is imposed upon the plaintiff. It appears from it, that the property in question was in the possession of the defendant when it was made and had been so from the death of the testatrix. It does not appear to have been taken at the plaintiff's request, or kept for his benefit. There was no consideration received by him, no benefit accruing to him from the transaction. On the other hand, the defendant was not only in possession, but claiming a portion of the property as her own; what portion does not appear, but from the previous statement, that there was "some question as to the title of a part or the whole of it," we may well understand that the defendant herself, did not then know what portion she would eventually claim. In this condition of things, the defendant gave the writing which she now puts in evidence, agreeing to keep the property free of expense to the plaintiff, and to deliver on demand such of it as she *admits* to be the property of the estate, and so much of the balance, on demand, after the question of title is settled, as is found to be the property of the estate. It does not appear that any third person has ever made any claim to any part of this property. Furthermore, in the closing sentence, it is provided that, by the instrument, she waives no right whatever, but reserves all title to any of the property which she then possessed.

Thus it seems to be clear that the writing shows a mere indulgence, on the part of the plaintiff, to enable the defendant to satisfy herself as to her own title. She assumes the burden, she desires time to make clear that which was then dark. She has had her time. She has satisfied herself, for although she then at least had a doubt about a part, she now unhesitatingly claims the whole and puts her defence upon that ground. In her mind, so far as we can judge from the developments of the case "the title was settled" before the commencement of the action, and the title she insists upon, had its origin before the

writing was made, and thus comes within its concluding clause—not to be waived. These views settle the question of conversion. The plaintiff has made out a title and the right to immediate possession. This, with the demand and refusal, especially with the claim of title by the defendant, is amply sufficient.

This, too, disposes of the claim that the action should have been upon the written instrument; whatever may be the force of that, it neither changes, nor purports to change the title to the property, or the right to the possession, under the title. The two must go together.

*Exceptions overruled. Judgment
on the verdict.*

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL,
JJ., concurred.

STATE OF MAINE *vs.* MANLEY ELLIS DODGE.

Waldo. Opinion December 7, 1886.

Intoxicating liquors. Nuisance. R. S., c. 17, § 1.

An indictment which charges a person with keeping and maintaining "a building occupied by himself as a saloon and shop and resorted to for the illegal sale of intoxicating liquors," is not sufficient to bring it within the statute against nuisances, (R. S., c. 17, § 1.)

ON exceptions to the ruling of the court in overruling a demurrer to the indictment, which was as follows:

"The jurors for said state upon their oaths present that Manly Ellis Dodge, of Belfast, in the said county of Waldo, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-five, and on divers other days and times between said first day of January aforesaid, and the first day of November, in the year of our Lord one thousand eight hundred and eighty-five, at Belfast aforesaid, did keep and maintain a common nuisance, to wit: A certain building on Main street in said Belfast, then from the said first day of January aforesaid, to said first day of November aforesaid,

occupied by the said Manly Ellis Dodge as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors, against the peace of the state, and contrary to the form of the statute in such case made and provided."

Orville D. Baker, attorney general, and *R. W. Rogers*, county attorney, for the state.

The indictment need not follow the exact language of the statute. If it sets forth the offence in language equivalent to that used in the statute, or substantially follows it, that is sufficient. *State v. Hussey*, 60 Maine, 410; *Commonwealth of Massachusetts v. Rowe*, 1 New England Reporter, 911.

When the statute read "resorted to for the illegal sale," &c., an indictment setting forth that the respondent kept a shop "used for the illegal sale," &c., was held good. *State v. Lang*, 63 Maine, 215. It would seem that the rule should work both ways. Had the indictment in that case read "resorted to for the illegal sale," &c., it will not be doubted that the result would have been the same. But the meaning of the statute, as it was there construed, has not been changed. If the phrase "resorted to" when it occurs in a statute means "used," it must needs mean the same when employed in an indictment in a description of the same offence.

And that is what it does mean in this case. It can not be made to mean anything else. To say that a place is "resorted to" for the commission of certain acts, implies that those acts are there committed. If intoxicating liquors were illegally sold in the place kept by the respondent, it follows that the place was "used" for that purpose.

William H. Fogler, for the defendant, cited: *State v. Hussey*, 60 Maine, 410; *People v. Allen*, 5 Denio, 76; *Whart. Crim. Law*, § 364; *Com. v. Stahl*, 7 Allen, 305; *Com. v. Lambert*, 12 Allen, 177.

DANFORTH, J. This case presents the question as to the sufficiency of an indictment founded upon R. S., c. 17, §1. If sustained, it must be under the first clause of the section, which

so far as necessary for the case, reads as follows, viz.: "All places used . . . for the illegal sale or keeping of intoxicating liquors," are common nuisances. By § 2, the keeper or maintainer of such nuisance shall be punished by fine or imprisonment.

The material part of the indictment charges that the defendant "did keep and maintain a common nuisance, to wit: A certain building . . . occupied by the said Manly Ellis Dodge, as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors," &c.

The statute declares buildings used for illegal sale or keeping, &c., nuisances. The indictment alleges that the building was resorted to for that purpose. It is claimed that the two expressions mean the same thing. This can not be. Neither word has any technical meaning attached to it. Both must, therefore, be construed in their ordinary and usual signification. The building may be, and is, used by the occupant or keeper. It is resorted to by other persons. If used for sales, it must be understood that sales are made by the keeper, or under his authority. If resorted to for that purpose, sales may or may not be made, and if made are supposed to be made by the persons so resorting, and here is no allegation that any sales were made, or if so, that they were made by the consent, or knowledge even, of the defendant. He is charged with keeping a saloon and shop. Other persons are charged with resorting to it for the purpose of illegal sales. If such sales are made the evil may be as great as though made by the keeper. But that is not the offence provided by the statute. Besides, he is not charged with keeping the building for any such purpose, and should not be punished for the wrong of others. *Com. v. Stahl*, 7 Allen, 304.

The case of *State v. Lang*, 63 Maine, 215, relied upon in support of the indictment, is not in point. It does not hold that the phrases "resorted to" and "used for" are of the same meaning, but rather that the proper construction of the statute under which that indictment was found, required the insertion of the words "used for" before the words "illegal sale," and

not the words "resorted to," and hence the words "used for" were properly used in the indictment as more accurately expressing the intention of the statute. Since then, the statute has been changed so as to leave no doubt that the construction then given is the true one, and the indictment in the case at bar should have followed that. *Com. v. Howe*, 13 Gray, 26.

Exceptions and demurrer sustained.

Indictment adjudged bad.

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

ANDROSCOGGIN SAVINGS BANK, in equity,

vs.

WILLIAM A. MCKENNEY.

Androscoggin. Opinion December 8, 1886.

Mortgages. Payment.

When a mortgagee, who holds two mortgages, one of real and the other of personal estate, to secure the payment of the same debt, forecloses the personal mortgage, takes possession of the property and converts it to his own use, if its value exceeds the debt secured, it operates as a payment or satisfaction of it. There is no longer an existing debt to uphold the real mortgage.

ON BILL, answer and proof.

When the cause came on for hearing at *nisi prius* the following order was passed :

"This cause having come on for hearing and the justice presiding being of the opinion that there are questions of law involved of sufficient importance to justify, and the parties thereto agreeing, the cause is referred to the law court next to be holden in this district."

The material facts are stated in the opinion.

Frye, Cotton and White, for the plaintiff, cited : 1 Jones, *Mortgages*, § § 864, 858 ; 3 Pomeroy, *Eq. Jur.* §§ 1206, 1213 ; *Brown v. Lapham*, 3 Cush. 555 ; *Kilborn v. Robbins*, 8 Allen, 466 ; *Buller v. Seward*, 10 Allen 466 ; *McCabe v.*

Swap, 14 Allen, 188; 1 Jones, Mortgages, § 743; *Welch v. Beers*, 8 Allen, 151; *Bradley v. George*, 2 Allen, 392; *Brown v. Simons*, 44 N. H. 478; 1 Story, Eq. Jur. § § 700, 705; *Clouston v. Shearer*, 99 Mass. 209; *Wyman v. Fox*, 59 Maine, 100.

Savage and Oakes for the defendant.

Equity upon this subject "is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it when at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. This intention is a question of fact, and is to be tried and determined in the same manner as are other issues." The intention is generally determined by the interest, though all the surrounding circumstances are to be considered. 1 Jones, Mortgages, 848, 856, 858; 24 Maine, 427; 3 Maine, 260; 7 Maine, 102; 7 Maine, 377; 34 Maine, 50, 299; 14 Maine, 9; 16 Maine, 146; 22 Maine, 85; 24 Maine, 332; 3 Pick. 475; 5 Pick. 146; 8 Met. 517; 2 Allen, 300.

LIBBEY, J. This is a bill in equity, praying for a decree requiring the respondent to release and cancel a mortgage given by Roland E. Patterson to Frank W. Dana, held by him as assignee. The case comes before this court on bill, answer and proofs.

The facts material to the determination of the case are as follows: On the fourth day of April, 1883, said Patterson mortgaged the land in controversy, to said Dana, to secure the payment of one thousand seven hundred and sixty dollars. On the same day he mortgaged to him certain personal property, to secure the payment of the same debt.

On the sixth of April, 1883, the complainant commenced an action of assumpsit against Patterson and attached his real estate, and prosecuted its action to judgment, and within thirty days from the rendition of judgment, duly levied its execution on the land embraced in said mortgage.

On the second day of November, 1883, William Lydston

bought of said Patterson, the personal property embraced in the mortgage to Dana, subject to the mortgage, "which said Lydston assumes and agrees to pay."

On the eighth day of said November, Lydston paid to Dana the balance then due on the debt secured by said mortgages, amounting to one thousand four hundred and sixty-five dollars and seventy-eight cents, and took from him an assignment of both mortgages. Before the assignment, Dana had taken the necessary steps to foreclose the personal mortgage, and the foreclosure became absolute soon after. At the time of the assignment and foreclosure the personal property was worth more than the amount due on the mortgage debt. It came into the possession of Lydston and was converted by him to his own use. On the fifteenth of September, 1885, Lydston assigned the mortgage of the land to the respondent.

We are of opinion that, upon these facts, the mortgage debt had, in law, been fully paid, and that the respondent took nothing by the assignment. Lydston, by the terms of his bill of sale of the personal property, assumed the debt and agreed to pay it. He did pay it to Dana. But the respondent claims that it was agreed, *verbally*, between Patterson and Lydston, at the time of the purchase of the personal property by Lydston, and that this agreement was a part of the transaction at the time, that Lydston should have an assignment from Dana, of both mortgages. Dana was not a party to this agreement. Now if this be so we cannot see that it changes the result. The respondent, by the assignments from Dana to Lydston and from Lydston to him, can stand no better than Dana would, on the same facts.

When a mortgagee who holds two mortgages, one of real and the other of personal estate, to secure the payment of the same debt, forecloses the personal mortgage, takes possession of the property and converts it to his own use, if its value exceeds the debt secured, it operates as a payment or satisfaction of it. There is no longer an existing debt to uphold the real mortgage, and it is as effectually extinguished, as if the debt had been paid in money.

Before the assignment to the respondent, Lydston, had received the personal property mortgaged, of a value not only sufficient to pay the mortgage debt, but the three hundred dollars also, which, by the contract with Patterson, he was to pay him as fast as he should receive it after the payment of the mortgage. The mortgage debt having been paid, the respondent took nothing by the assignment. There must be a decree that the respondent execute and deliver to the complainant, a discharge of the mortgage held by him with costs for complainant. R. S, c. 90, § 15.

Decree accordingly.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

ANDREW J. STEVENS vs. BENJAMIN KELLEY, JR. and another.

Waldo. Opinion December 7, 1886.

Waters. Mill-pond. Ice.

The owner of a mill-dam on an unnavigable stream, who does not own the bed of the stream above the dam, has a qualified interest in the water flowed but none in the ice formed upon it.

The riparian owner is the owner of the ice in such case, though the ice privilege is made by the flowage.

Where the owner of such a mill-dam maliciously and unnecessarily draws the water from the pond and thus destroys the ice field, he is liable in damages to the riparian owner who owned the land under the pond.

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ON REPORT, with the stipulations that, if the action could be maintained upon the allegations contained in the declaration, the case was to stand for trial, otherwise a nonsuit was to be entered.

The declaration was as follows :

"In a plea of the case, for that whereas there now is and from time immemorial hath been a large unnavigable stream of fresh water, called Goose River, flowing in its natural channel from Goose Pond in the town of Swanville, through said Belfast, and through the land of said plaintiff, into Belfast Bay ; and whereas there now is, and for more than thirty years last past, has been

a stone dam across said stream about fifty rods, below and southerly of the land of said plaintiff, built, and prior to January first, A. D. 1880, maintained and used exclusively for the purpose of operating a mill connected with said dam, which said dam, mill and mill privilege, on said first day of January, A. D. 1880, were, ever since have been, and now are owned by, and in the possession of said defendants. And plaintiff avers that ever since said first day of January, A. D. 1880, said mill has been idle, abandoned and unused and whereas on the first day of January, A. D. 1880, said plaintiff was, ever since has been, and now is seized and possessed of a certain parcel of land situated upon both sides of said stream, including said stream and extending northerly from a line drawn east and west across said stream about fifty rods northerly of said dam, and upon said land of said plaintiff, there is and for more than thirty years last past has been a pond of fresh water of the area of twenty-five acres, flooded and kept up by means of said dam of defendants, making a valuable privilege for cutting and harvesting ice, on which pond plaintiff might, and but for the acts of defendants hereinafter alleged, would, every year since said first day of January, A. D. 1880, have cut and harvested ten thousand tons of good, clear, merchantable ice, at a yearly net profit to him of three hundred dollars, and plaintiff avers that the use of the water above said dam for the purpose of operating said mill since said first day of January, A. D. 1880, would not materially have injured the plaintiff in his use and enjoyment of said ice privilege."

"Yet the said defendants well knowing the premises, but maliciously contriving and intending to hinder and deprive the plaintiff, of the profit and advantage of said ice privilege, and unjustly to aggrieve the plaintiff, from the first day of May to the first of December in every year since said first day of January, A. D. 1880, have kept and maintained said dam, with flash boards of the height of two feet upon said dam and across said stream, thereby during said time keeping said stream and pond above said dam filled with water to the level of the top of said flash boards, and on the first day of January, A. D. 1880,

and on divers other days and times during each and every winter season between said day and the day of the purchase of this writ, while the ice was forming and being cut and harvested by said plaintiff upon said pond, said defendants did open the sluice way and gate of said dam, and thereby cause the water to flow out of and away from said pond, whereby the ice forming in said pond, and being cut and harvested by the plaintiff, as aforesaid, was settled and precipitated to the bottom of said pond, upon and into the mud, and said ice to the amount of ten thousand tons per year, and of the yearly net value of three hundred dollars, was thereby wholly destroyed and lost to the plaintiff, and by keeping said stream and pond filled with water, from the first day of May to the first day of December of each of said years since said first day of January, A. D. 1880, by means of said dam and flash boards as aforesaid, said defendants have hindered and wholly prevented the plaintiff from erecting and maintaining a dam across said stream, upon his own land, below said pond and ice privilege, for the purpose of holding the water in said pond, and protecting and preserving his ice thereon, to the damage of said plaintiff, as he says, the sum of fifteen hundred dollars, which shall then and there be made to appear with other due damages."

Thompson and Dunton, for the plaintiff, cited :

Mansur v. Blake, 62 Maine, 38; *Robinson v. White*, 42 Maine, 216; R. S., c. 92, § 1; *Jordan v. Woodward*, 40 Maine, 317; *Crockett v. Millett*, 65 Maine, 191; *Farrington v. Blish*, 14 Maine, 423; *Wilson v. Campbell*, 76 Maine, 94; *Dixon v. Eaton*, 68 Maine, 542; *Paine v. Woods*, 108 Mass. 160; *Baird v. Hunter*, 12 Pick. 555; *Phillips v. Sherman*, 64 Maine, 174; R. S., c. 92, § 35; R. S., c. 127, § 5.

W. H. Fogler, for defendants.

The declaration does not deny the defendants' right to maintain their dam, flow the plaintiff's land, but on the contrary, assumes and avers that the defendants have such right. "There now is, and for more than thirty years last past there has been a stone dam across said stream . . . built . . .

maintained and used exclusively for the purpose of operating a mill," &c. There is no allegation that the building, maintenance and use of the dam was unlawful or without right.

The allegation that "ever since said first day of January, A. D. 1880, said mill has been idle, abandoned and unused," is not a sufficient averment that the right to maintain the dam has been lost by non user. *Farrar v. Cooper*, 34 Maine, 394, 399 *et seq.*

To establish an abandonment of a right, the enjoyment of the right must have totally ceased for the same length of time that would be necessary to acquire the right by adverse enjoyment. *Corning v. Gould*, 16 Wend. 535.

The declaration does not aver that the plaintiff has the right to maintain a dam above the defendants' dam at any point where his land is flowed by the defendants' dam. Applying the rule of priority he would have no such right. *Lincoln v. Chadbourne*, 56 Maine, 197.

The plaintiff shows no right by adverse possession to use the pond for the cutting of ice. *Pillsbury v. Moore*, 44 Maine, 154; *Lockwood Co. v. Lawrence*, 77 Maine, 319 *et seq.*

The riparian owners upon an unnavigable stream are entitled by common law to the natural flow of the water. They have the right to a reasonable use of the water—not an ownership in the water, but a right to appropriate it reasonably to his private use. *Gould on Waters*, § 204; *Davis v. Getchell*, 50 Maine, 602.

The riparian owner and the person who flows, have each a qualified right in the ice which forms in an artificial pond, *i. e.* the mill owner has the right to have the ice remain if its removal will appreciably diminish the head of water at his dam; and the riparian owner has the right to cut and remove the ice if its removal will not appreciably diminish such head. *Gould on Waters*, § 191, and cases cited.

The rights of the owner of the dam are clearly expressed by the court in *Bradford v. Cressey*, 45 Maine, 9.

In *Paine v. Woods*, 108 Mass. 160, in which it was held that in estimating damages under the "Mill Act" the benefit which would result to the owner of the land flowed by the

facilities afforded by the flowage for the cutting of ice, the court admit that the mill owner may at any time open his dam and let down the pond.

DANFORTH, J. This action is reported upon the allegations in the writ, and for the purposes of this hearing, such allegations must be taken as true.

It appears that the parties are respectively riparian owners upon a fresh water unnavigable stream; the defendants owning a mill below, with a privilege and a dam which flows the water back upon the plaintiff's land, thereby creating a pond, which is useful and profitable for cutting ice in the winter season. The defendants' dam has been accustomed thus to flow for more than thirty years. By what title the defendants obtained this right to flow does not appear, and perhaps it is not material. They have it, and as it does appear that the plaintiff is not only a riparian owner, having a title to both the banks but to the bed of the stream also, it necessarily follows that the defendants' right in this respect, is one of flowage only.

It is alleged in the writ that the defendants have not, for several years, used their mill, but that they have flowed the water in the summer and early winter, but that when the "ice was forming, and being cut and harvested," they let the water out of the dam, by opening the gate and sluiceway, thus causing the ice to fall into the mud and become spoiled; and this is the act complained of. The allegation that, by flowing in the summer, the plaintiff is prevented from building a dam for his own use, cannot be taken as a substantive cause of action, as is plainly shown by the context. It may have been put in to show the motive of the defendants or as an aggravation of damages, but whether it subserves any useful purpose, is not material now, as it cannot be a foundation for or even an element in the cause of action.

The result of the case must depend upon the rights of the respective parties in the property involved.

The defendants' right of flowage, whether obtained by grant,

or under the mill act, having been used for more than thirty years with the mill, and so far as appears, for no other purpose, must be understood to be for the benefit of the mill. As such, their right to the use of the water thus flowed, must be limited by the wants and requirements of the mill, at least in kind. It might, perhaps, be more or less extensive in quantity, as changes in the mill from time to time, might require more or less water, but it could be used for no other purpose. As was said in *Crockett v. Millett*, 65 Maine, 195, "the mill is the principal. The dam is subservient to it." So too, this use of the water, is not unlimited. There are owners above and below, whose rights and whose interests are to be regarded. The owner of such an easement is not at liberty to consult his own interests or whims, only as to when, or in what quantity he shall let out the water thus accumulated. Even when rightfully accumulated, he must exercise ordinary care, in regard to the interests of riparian owners, both above and below, in letting it out. *Frye v. Moor*, 53 Maine, 583; *Phillips v. Sherman*, 64 Maine, 174.

The plaintiff as riparian owner above, has his fixed and well defined rights. Among others, not necessary to be noticed in this case, is that of taking ice from the stream where it flows over his land. Whether this right could have been profitably exercised, without the flowing, is not a question involved here. With the flowing it can be and the plaintiff has the right to avail himself of all the improvements made to his property even by the defendants. Nor can the defendants avail themselves of such a right though created by them. It is not a purpose recognized by law for which a person's land can be appropriated by another, but is a privilege attached to, and becomes the property of, the plaintiff.

This right to take the ice is not a new one, though, perhaps, a greater importance has become attached to it within the last few years than formerly. It results from and grows out of the title to the bed of the stream, and such right to the use of the water as results therefrom. This right is well settled by authority, as well as by principle. *Gould on Waters*, § 191; *Hum v. Salem*, 100 Mass. 350; *Paine v. Woods*, 108 Mass.

172. The plaintiff's title to the ice must be the same as in the water before it is congealed, and that is so well settled that it needs no further discussion. *Elliot v. Fitchburg R. R. Co.* 10 Cush. 191. The plaintiff therefore has the sole right to take the ice from the water resting upon his land, with the single qualification that it is not to be taken in such quantities as to appreciably diminish the head of water at the dam below. *Cummings v. Barrett*, 10 Cush. 186. If this diminution could ever take place from such cause as is doubted in the case last cited, (see pages 189, 190) there can be no such claim in the case at bar, for the mill was not in use and the water was not needed. Thus at the time the water was drawn off the title of the plaintiff to the ice was virtually absolute.

From this view of the rights of the several parties, it would seem to follow as a self evident proposition, that the defendants' interference with the plaintiff was unjustifiable, and that damages having resulted, they would be liable. But it is said that having raised the water, it was their privilege to let it down. It may be true that they were under no obligation to keep up the dam any longer than their interest, or whim even, might dictate. But the dam was not removed nor abandoned. It was kept up, and by an affirmative act on the part of the defendants, the water was drawn off when it was of no use to them, but a serious injury to the plaintiff. This can not be said to be consistent with their qualified right to the use of the water, and the reasonable care which they are legally bound to exercise in that use. It is rather a wanton use, a disregard of the rights of others which the law condemns, and which the writ alleges to be malicious and for the purpose of injuring the plaintiff. In *Phillips v. Sherman*, *supra*, on page 174, it is said, "a wanton, or vexatious, or unnecessary detention, would render the mill owner so detaining, liable in damages to those injured by such unlawful detention." If the owner of the dam has no right unreasonably to detain the water, for the same reason he would have no right wantonly to accelerate it to the injury of owners above or below. In *Frye v. Moor*, *supra*, it was held that when water is accumulated wrongfully, the party so doing in

letting it out must do so at his peril. In this case, so far as appears, the defendants had the right to flow the water for their mill only. It was not raised for that purpose, for the mill was not used. Nor does it appear for what purpose it was raised, except as alleged in the writ, to injure the plaintiff.

The case of *Chesley v. King*, 74 Maine, 164, in the principles involved, is substantially like this. There, the defendant, in digging a well upon his own land, destroyed the plaintiff's spring by drawing from it the water which percolated through the earth and thus supplied the spring. In that case it was held, after much consideration and a careful review of the authorities, that the defendant, though in the exercise of a right and would not be liable to an action so long as he acts in good faith and with an honest purpose, yet he would be liable if he dug the well for the sole purpose of inflicting damage upon the party who has rights in the spring. The case at bar would seem to be a stronger one for the plaintiff. In this the defendants have only a qualified interest in the water, a right to use it for a specified purpose only; and in that use bound to exercise due care in regard to the rights of others. Yet in the act complained of they were not in the use of the water for their own legal purposes, nor were they in the exercise of due care, by which an injury happened to the plaintiff.

This result is reached from a consideration of the facts alleged in the writ alone. What title to the water the defendants may show, or what excuse for their act, can only appear upon the trial.

Action to stand for trial.

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

ALEXANDER MARTIN vs. HARRISON B. MASON.

Hancock. Opinion December 7, 1886.

Logs with same mark. Trover. Conversion. Demand.

A and H, each, owned a lot of logs of the same kind, quality and value, and bearing the same mark. H (and another party) contracted to saw A's logs

at the same mill where his own were to be manufactured. The logs became intermixed without the fault of either party. *Held*: That A was entitled to his proportional part of the lumber manufactured from all the logs, and that if H converted to his own use more than his proportional part of the lumber, he would be liable in trover for the same without a special demand.

ON EXCEPTIONS.

Trover to recover the value of a certain quantity of logs claimed by the plaintiff to have been converted by the defendant.

At the trial the presiding justice instructed the jury as follows :

(1.) "We find these two gentlemen each with an interest in a body of logs of the same mark. As soon as they ascertain this fact it is the duty of each in justice to the other and everybody, to take extra measures for the care of his own logs, and to avoid trespassing upon the rights of others. And they are bound, if they can not make mutual arrangements to distinguish their logs, to keep them apart so that they will not become mixed. Now, in this case, I will give you this rule : If, as soon as this similarity of marks was ascertained by the two parties, it appears to you that Mr. Martin undertook by arrangement, or that he undertook and gave notice accordingly, and that it was understood by the other side that he undertook to change the mark upon his logs, and he gave the other side to understand that he was going so to do and would so do, and in pursuance of that arrangement between the two he undertook to do it, then he thereby gave the other party to suppose that all of his logs would be so changed, and if he allowed any of his logs to remain without the change and allowed them to run without any care on his part into the river, and if, without any care on his part or any oversight on his part, they escaped, and without any fault of Mason's or any design on his part, got mixed with Mason's logs, Mr. Mason would not be obliged at his peril to separate these logs from his own, but he might assume that they were his logs and Mr. Martin could not afterwards sue him for the value of them, at least until he, Martin, had made a demand upon him for the logs."

The presiding justice further instructed the jury, as follows :

(2.) "So it is simply this : If you should find that Martin,

after talking with Mason as to what should be done, and it was finally understood either by language or words in any way, that this difficulty was to be settled, and this embarrassment got rid of by Martin changing the mark upon his logs, and he undertook to do it, and Mr. Mason so understood it, and Mr. Martin did change part of them, and he left part unchanged to run in the river loose, without any care on his part to keep them separate from Mason's, and they got mixed with Mason's logs without his fault, he would have a right to regard them as his logs, at least till demand was made, and no proof of any demand being made in this case, Mason would not be liable in this case, whatever he might be under other and different state of affairs for using those logs as his own."

The presiding justice further instructed the jury as follows:

(3.) "I instruct you that the fact that these logs came into Mason's boom is not proof enough, because they may be there now for that matter. It is not enough that they went into his mill, or that they were sawed by him, but to make out the conversion it must appear that after they were sawed Mason appropriated the lumber to his own use by selling it, hauling it away for himself, or putting it upon his own pile, thereby indicating that he took it for himself."

The plaintiff alleged exceptions to these instructions.

Wiswell and King, for the plaintiff, cited: *Clough v. Whitcomb*, 105 Mass. 482; 30 Maine, 242; 2 Parson's Contracts, 137; 2 Kent's Com. 365, note; *Heselton v. Stockwell*, 30 Maine, 237; *Ryder v. Hathaway*, 21 Pick. 298; 54 Am. Dec. 596 note; 12 Maine, 243; 49 Maine, 383; 51 Maine, 160; 42 N. Y. 549; 92 Ill. 218; 3 Cal. 53; 21 Pick. 559; 7 Gray, 158.

John B. Redman, for the defendant.

DANFORTH, J. In this case the first and second instructions excepted to, are in substance the same. They were given upon a supposed state of facts, which, if found by the jury as supposed, would leave them no option but to return a verdict for the defendant, as they did. The language used, so far as it relates to the facts, may be susceptible of different interpretations when

taken by itself. We must, therefore, ascertain its meaning by applying it, as the jury must have done, to the evidence and admitted facts as shown by the case.

The case shows that during the same winter, the two parties were separately engaged in cutting logs upon Union river. The logs cut were in all respects, including the value, similar, and each party used the same mark, being ignorant of the use of it by the other. When this fact became known, Mason (the defendant) requested the plaintiff to put an additional mark upon his logs, which he refused to do. He did, however, subsequently attempt to make the change, and succeeded in part, but before completing the work the logs escaped from the boom and run down the river, without any fault on his part. Of this attempt on the part of the plaintiff the defendant had knowledge.

The logs of the two parties run down the river the same seasons. Subsequently the plaintiff's logs were sawed under a contract by the thousand, at a mill owned by the defendant and one Cushman. The defendant testified that he presumed that all the logs which came to the mill with the unchanged mark "were sawed for him, and that he received, shipped and sold the lumber." The plaintiff claimed that either by accident or design, a large portion of his lumber had not been accounted for, and for this portion he claims to recover in this action.

To these facts must the instructions be applied, by them must their accuracy be tested. With these facts before them the jury must so have understood and acted upon the instructions given. Nor does it require any great straining of the language used by the court to so understand them. There was an attempt on the part of the plaintiff, after talking with the defendant, partially successful, to put an additional mark upon his logs, and the defendant might have inferred that the "difficulty was to be settled in that way." But the case not only fails to show any contract, or even promise to make the change, but distinctly negatives any such supposition. Nor does it appear that any representations were at any time made to defendant that the change in the mark had actually been made, so as to raise any question of estoppel. The plaintiff did leave a "part of his logs

with the mark unchanged to run loose in the river, without any care on his part to keep them separate from Mason's." But that want of care was under such circumstances as to show no fault on his part, and the case so finds.

So far, it appears affirmatively that the plaintiff was not in fault for any mixture of the logs, if any took place before their arrival at the mill. Nor does it appear that up to that time any fault rests upon the defendant. Under the circumstances attending the cutting and running these logs, the same rights and obligations would rest upon each party; and from the facts in the case, if the mixture occurred before their arrival at the mill, neither party would forfeit any right to the logs to the other, but each might claim, and would be entitled to, his specific quantity of the lumber, though he might not be able to identify his specific logs. Hence the instruction that under the given facts the defendant "would have a right to regard the logs as his," even without a demand, must be deemed erroneous. *Loomis v. Green*, 7 Maine, 386; *Hesseltine v. Stockwell*, 30 Maine, 237; *Ryder v. Hathaway*, 21 Pick. 298; *The Idaho*, 93 U. S. S. C. 585; 2 Kent, (12th ed.) 364.

True, the instruction does not necessarily imply that the plaintiff, under the given facts, had forfeited all title to his logs, but it must mean all that is said in the first instruction, that the defendant "would not be obliged at his peril to separate these logs from his own, but he might assume that they were his logs . . . at least until demand was made." But if he could assume they were his until demand, he could make any conversion of them without liability, and in the second instruction the jury are told that in this case the defendant would not be liable in the absence of any proof of a demand. But if the plaintiff had not forfeited his title to his logs, it is clear from the authorities cited, especially *Ryder v. Hathaway*, that in such case any use of the property inconsistent with the owner's title, will prove a conversion without a demand and refusal. In this case the defendant admits that all the logs which came into his mill without the additional mark "were sawed for, and received, shipped and sold by him." If this included any of the plaintiff's

logs, it would certainly be a sufficient conversion to enable the plaintiff to recover for so much of his lumber of the unchanged mark as he can prove went into the mill and has not been accounted for.

The third instruction, though unobjectionable in itself, does not purport to supersede, or in any way modify the second. It does not appear whether it was given as applicable to the same or a different state of facts; nor were the first and second withdrawn. They must, therefore, stand as they are, and thus standing, must be deemed erroneous.

The case seems to assume rather than to show, any confusion of these two lots of logs, and if such mixture did occur, leaves it uncertain whether before or after their arrival at the mill. If after, an additional obligation would devolve upon the defendant by virtue of his contract for the sawing. If not already mixed before the arrival, it would be his duty to keep them separate, and if he did not succeed, he might not perhaps forfeit his logs, but it might to some extent change the burden of proof or the amount required to prove a conversion.

Exceptions sustained.

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

INHABITANTS OF PHIPSBURG vs. ALBION DICKINSON and others.

Sagadahoc. Opinion December 6, 1886.

Collectors of taxes. Appropriation of deficiency. Auditor's report. Evidence.
R. S., c. 82, § 71.

The same person was collector of taxes in a town for three years in succession, when there appeared a deficiency in his accounts. There was no evidence showing the time when the deficit commenced, or when it occurred, or of any appropriation of payments by him to the town, either by the collector or the town. He gave a bond each year. *Held*: That the deficit should be divided between the three bonds in the proportion of the sums collected by the collector on each commitment

By R. S., c. 82, § 71, an auditor's report is made admissible in evidence.

ON EXCEPTIONS.

The case is stated in the opinion.

Washington Gilbert, for the plaintiffs, cited: R. S., c. 82, § 71; *Porter v. Stanley*, 47 Maine, 515.

C. W. Larrabee, for the defendants.

In *Porter v. Stanley*, 47 Maine, 515, we infer that there was some sort or system of book-keeping, to indicate the transaction of the several years in which defendant was a collector, because they were able to identify the fund from which money was taken to make up a deficiency in the first of those years. They did not cast before the court a mass of "*dejecta membra*," as in this case, but TENNEY, C. J., says, with regard to taking moneys of that year to balance the amount of deficiency for a previous year, "This does not appear to have been done at the request of William Stanley or by his consent, any further than, if it was right that it should be done, he would consent thereto."

In *United States v. Eckford's Executors*, 1 Howard, 262, the court says, "The government must show the amount of defalcation of the collector during the term for which the defendants were sureties, to charge them."

"The sureties should not suffer from a mistake of the treasurer in passing credit to the wrong account," says APPLETON, C. J., in *Inhabitants of Orono v. Wedgewood*, 44 Maine, 51. "It will generally be admitted that moneys arising due and collected subsequently to the execution of the second bond, can not be applied to the discharge of the first bond without manifest injury to the surety in the second bond." 7 Cranch, 575; *U. S. v. January and Patterson*.

LIBBEY, J. This is debt on the bond of A. Dickinson as collector of the plaintiff town for 1880. The plea is the general issue with brief statement of performance of the conditions of the bond by Dickinson. The case went to an auditor who heard the parties and made his report to court. At the trial, the auditor's report was offered in evidence by the plaintiff. It was objected to by the defendants on several grounds, but it was admitted and exception taken. It was properly admitted in evidence. R. S., c. 82, § 71.

Whether, in adjusting the amounts between the parties, the

rules of law applied to the case by the auditor were correct or not, was for the court, but the exception fails to show whether the court, in that respect, sustained the auditor or not. But the case is argued by the counsel for the defendants on the assumption that the court sustained the auditor in the law. Assuming this is the fact, that the court gave the jury the same rule of law which the auditor acted upon, we think there was no error.

Dickinson was collector for 1880, 1881 and 1882, with different sureties on his bond each year. Actions were brought and pending in court on each bond; and they were all committed to the auditor and heard together. The pleadings were the same in each case. The only elements given us by which appropriation of payments can be made, or the deficiency apportioned among the bonds, are as follows: The taxes assessed each year were duly committed to the collector, and on the commitment for 1880 he collected \$11,466.32; for 1881, \$11,484.99; for 1882, \$8,118.95. The deficiency not accounted for and paid over by the collector for the three years, was \$789.76. There is no evidence showing when the deficit commenced or in which year it occurred. There is no evidence of any appropriation of payments by the collector or by the town. The rule adopted by the auditor divided the deficit between the three bonds in the proportion of the sums collected by the collector on each commitment. We think this rule is correct. It is claimed by the learned counsel for the defendants in this case, that, it appearing that the collector paid over during the three years more than he collected on the assessment for 1880, the law presumes, in the absence of proof, that he performed his legal duty and paid over all he collected for that year. But the legal presumption is just as strong as to each of the other years, and, as he could not legally appropriate as against his sureties what he received on one assessment in payment of what he received on another, the law will not apply the payments to the oldest debt. *Porter v. Stanley*, 47 Maine, 515; *Orono v. Wedgwood*, 44 Maine, 51.

In the absence of any evidence of appropriation of payments,

or of the source from which the moneys paid came, we know of no more equitable rule of appropriation and of dividing the deficiency than the rule adopted by the auditor. It is at least sufficiently favorable to the defendants under the plea of performance. It being proved how much the collector received on the assessment for 1880, the burden is on the defendants to prove that he accounted for it and paid it over, as it was his legal duty to do. *Small v. Machiasport*, 77 Maine, 109. This they fail to do.

There is a motion to set the verdict aside as against the evidence, but it nowhere appears in the case how much the verdict was, and if there was no error in the law, the motion is not insisted on.

Exceptions and motion overruled.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

JOHN S. GRANT, Appellant,

vs.

ABBIE H. BODWELL and others.

Knox. Opinion December 11, 1886.

Executors and administrators. Distribution of personal estate. Alabama claims.

Personal estate of an intestate for distribution among his heirs, descends to those living at the time of his death; and the decree of distribution should name each one of such heirs and his share, and if any have died in the meantime, the share of each one so deceased should be decreed to be paid to the executor or administrator of such deceased heir.

Money received upon a judgment of the court of commissioners of Alabama claims, by an administrator, becomes assets in his hands to be administered and distributed by him, as a part of his intestate's estate; and when the same is distributed to an executor of a deceased heir of such intestate, it becomes assets in the hands of such executor, to be administered by him according to the will of his testator.

By the residuary clause of her will, a testatrix gave her son "all the residue and remainder of my estate, real, personal and mixed, wherever found and however situated." *Held*: That this passed to the son, a sum recovered from an Alabama claim by a claimant's administrator and distributed to the executor of such will.

ON EXCEPTIONS.

Appeal from the decision of the judge of probate. The presiding justice sustained the appeal and reversed the decree of the probate court. To this ruling the appellees alleged exceptions.

The opinion states the material facts.

True P. Pierce, for appellant.

In *Thurston v. Lowder*, 40 Maine, 197, a question precisely in point is considered. An award was made by virtue of a treaty with the Mexican government for a vessel which had been destroyed. The treaty and award were both made long after the death of the owner of the vessel, and the court held that it made a part of his estate, although the treaty which made its collection possible was entered into long after his death. In the opinion in that case, Judge RICE quotes from the opinion in *Foster v. Fifield*, 20 Pick. 67, another case precisely in point.

This fund constituting a part of the estate of Priscilla E. Cables, at her death it descended with the rest of her estate to Carrie E. Cables. This court has once decided that Priscilla Prescott was the only heir of Carrie E. Cables. *Cables v. Prescott*, 67 Maine, 582.

The appeal was properly taken, as the appellant was the party aggrieved, and the only party, by the order appealed from. He also claims under an heir at law, and for that reason has an additional right of appeal, as shown by § 23, c. 63, R. S. ; § 29, c. 63, R. S.

The appeal having been taken, the judgment and all the proceedings of the probate court are vacated, and the Supreme Court has full power to reverse or affirm, in whole or in part, pass any decree that the judge of probate should have passed, or remit the case to the probate court for further proceedings. *Gilman v. Gilman*, 53 Maine, 184; *Carvill v. Carvill*, 73 Maine, 136; § 28, c. 63, R. S.

The rule laid down in *Knowlton v. Johnson*, 46 Maine, 489, does not apply to the case at bar.

Charles E. Littlefield, for appellees, cited: *Moody v. Hutchinson*, 44 Maine, 57; *Bradstreet v. Bradstreet*, 64 Maine,

211; *Fowle v. Coe*, 63 Maine, 248; R. S., c. 65, § 27; *Hughes v. Farrar*, 45 Maine, 72; 64 Maine, 583; *Knowlton v. Johnson*, 46 Maine, 489.

HASKELL, J. Priscilla E. Cables died intestate, leaving an only daughter, who died in her minority, unmarried, without issue, prior to distribution of her mother's estate, leaving a grandmother, Priscilla E. Prescott, her sole heir. *Cables v. Prescott*, 67 Maine, 582.

The grandmother, Mrs. Prescott, died testate, and afterwards, the administrator of Mrs. Cables settled his account in the probate court, showing a balance of personal estate in his hands for distribution, amounting to two thousand and ninety-two dollars and forty-six cents, which, on petition, the judge of probate ordered distributed among all the heirs of Mrs. Cables. From that decree an appeal was taken to this court, and at *nisi prius* the decree was reversed, and the administrator of Mrs. Cables was ordered to pay the balance named to the estate of the grandmother, Mrs. Prescott; and the case comes up on exception.

At the death of Mrs. Cables, her real estate descended to her heirs, and her personal estate to her administrator to be administered, and the balance distributed among her heirs; heirs living at her decease, instead of such only as may have survived at the time of distribution.

The judge of probate could only decree distribution among the heirs of the intestate as they existed at her death, and this he should do by naming each one in the decree; and if any heir had died prior to distribution, then its share should have been ordered to be paid to its legal representative, that it might be administered and subjected to the payment of any debts existing against the estate of such deceased heir; for without administration upon the estate of such deceased heir, it can not be judicially known what sum ought to be distributed, and to whom it should be paid.

If the decree of the judge of probate had directed the estate in question to be paid to the legal representative of the intestate's

deceased daughter and sole heir, no fault could be found with it, but it is treated as meaning that distribution shall be made among the intestate's next of kin, living at the date of the decree, as they are entitled by the law of descent; given such meaning, its scope was beyond the power of the judge of probate to decree, and it could not protect an administrator, who should obey it. True, in this case the sole heir was a minor, who died unmarried and without issue, and there can be little or no risk in the administrator's disposing of the estate in his hands in the same manner that her administrator would do, if there had been one, that is, by paying it to the executor of the grandmother's will, who would then dispose of it lawfully; but the rule is inflexible; an heir takes his share of the realty at the death of his ancestor, and then acquires a right to his distributive share of the personalty, whatever it may prove to be; and when acquired it becomes subjected to his debts, by means of the proper administration upon his estate. If the share of one heir may be treated as extinguished in a decree for distribution, why may not all be imperilled for such prudential reasons as have weight with a judge of probate? The decree must conform to the statute, and order distribution among the heirs of the deceased, who were living at his death, and if any of them be dead, then, that the share of that one be paid to his legal representative. R. S., c. 65, § 27; c. 75, §§ 1, 8; *Knowlton, appellant, v. Johnson, administrator*, 46 Maine, 489.

In this view of the case, the exceptions must be sustained, and a decree should be entered below, ordering payment to the estate of, or legal representative of, Carrie E. Cables, with costs as before provided. After such decree, the administrator, under the peculiar circumstances of this case, may conclude to assume the risk of paying directly to the executor of Mrs. Prescott, and thereby save the trouble and expense of an apparently needless administration, but of this he must judge, as the risk, if any, which he assumes in doing it, will be his own. *Cables v. Prescott, supra*.

Mrs. Cables, in her life-time, had lost by a confederate cruiser, a part of the brig "Joseph," and under the act of

congress touching the Alabama claims, her administrator recovered on account of that brig, the sum now held by him ready for distribution, and it is contended by the appellees that the same can not become a part of the estate of Mrs. Prescott and pass to her devisees, but that the same should be distributed among the kindred of Mrs. Cables, who are identical with the kindred of Mrs. Prescott, and some of them are persons not her devisees.

Mrs. Cables suffered the loss of her property by the act of a foreign enemy, in defiance of the sovereign power of the people of the United States, under a constitution declared in the preamble thereof to have been ordained to provide for the common defense. To the government, she had a right to look for protection, and from it, hope for redress, even though it be so long deferred as to make the "heart sick." Twenty years elapsed and relief came. The government found itself in possession of a fund, received from a foreign power, to indemnify citizens of the United States who had suffered loss by certain confederate cruisers, for whose acts that power was responsible, and after fully satisfying such losses, a balance of the fund remained in the federal treasury. Inasmuch as other citizens had suffered loss by other confederate cruisers engaged in the same business of destroying vessels belonging to citizens of the United States, congress, regarding its duty to procure indemnity to all citizens for losses suffered at the hand of an enemy, applied the balance of this fund to such purpose, and the legal representative of Mrs. Cables, by judgment of court, recovered in her behalf the money now in his hands. He recovered it in satisfaction of a loss that she had suffered, and not as a gratuity, or bounty given to her living kindred. *Comegys v. Vasse*, 1 Peters, 193, 215-217; *Erwin v. United States*, 97 U. S. 392; *Phelps v. McDonald*, 99 U. S. 298, 304; *Bachman v. Lawson*, 109 U. S. 659; *Leonard v. Nye*, 125 Mass. 455.

Although collected after her death, it was in satisfaction of a loss that she had sustained, and in payment of it. She could not recover it in her life-time, but her right to recover it was a constituent part of her estate, and vested in her administrator at

her death, and is to be distributed as personal estate. *Thurston, administrator, v. Lowder, administrator*, 40 Maine, 197.

When received by the executor of the grandmother, Mrs. Prescott, it becomes a part of her estate, and must be distributed according to her will. She declares that she makes her will, "intending hereby to dispose of all my estate." The residuary clause devises to the appellant, her son, "all the residue and remainder of my estate, real, personal and mixed, wherever found, and however situated." The intention is manifest, that all the estate, whether actually received before, or after her death, should pass under the will. The act under which the fund was recovered was passed the same day that the will was made, and the granddaughter had died many years before, leaving the testatrix her sole heir. It is unlike the case of *Blaisdell v. Hight*, 69 Maine, 306, where the language used was held insufficient to pass certain after acquired real estate, or the case of *Dunlap v. Dunlap*, 74 Maine, 402, where the testator made a schedule of his property, and devised the residue, after certain legacies, to a niece.

Exceptions sustained. Decree according to this opinion.

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

AMOS H. FLETCHER vs. JOHN HARMON and another.

Somerset. Opinion December 11, 1886.

Pledge. Money had and received. Set-off. R. S., c. 85, § 55.

Money received by the pledgee, from the legal sale of a pledge, becomes his own, to the extent of his debt; and he holds the balance, as "money had and received," for the pledgor's use.

Money received by the pledgee, from the illegal sale of a pledge, the pledgor, by waiving the tort, may require to be applied in payment of his debt, and the pledgee would hold any balance, as money had and received for the pledgor's use.

Money so held may be recovered in assumpsit, or by set-off.

The value of securities in pledge, tortiously dealt with by the pledgee, unless

reduced to money or its equivalent, can not be recovered in *assumpsit*, as money "had and received," nor by set-off.

The contract, touching a pledge to secure a debt, is collateral; and damages for its breach can not be allowed by way of recoupment, in defense of a suit to recover the debt.

On exceptions. The opinion states the case and the facts upon which it rests.

Merrill and Coffin, for the plaintiff, cited : R. S., c. 85, § 55; *Whitwell v. Williard*, 1 Met. 218; *Robinson v. Safford*, 57 Maine, 163; *Houghton v. Houghton*, 37 Maine, 72; *Winthrop Bank v. Jackson*, 67 Maine, 571; *Harrington v. Stratton*, 22 Pick. 510.

D. D. Stewart, for the defendants.

That the notes and mortgage pledged to the plaintiff could be enforced by him against the person making them, although not assigned in writing, is common learning. *Littlefield v. Smith*, 17 Maine, 327; *Orain v. Paine*, 4 Cush. 483; *Norton v. Ins. Co.* 111 Mass. 535; *Sprague v. Frankfort*, 60 Maine, 253; *Holmes v. French*, 70 Maine, 341; *Jones on Pledges*, §§ 142, 670.

That the conversion by the pledgee of the property pledged, if equal in value to the debt, affords a complete and full defence to an action brought by him to recover the debt, is abundantly established by the following authorities: *Stearns v. Marsh*, 4 Denio, 227; *Batterman v. Pierce*, 3 Hill, 171; *Rogers v. Humphrey*, 39 Maine, 384; *Cutting v. Marlbor*, 78 N. Y. 454; *Gruman v. Smith*, 81 N. Y. 26; *Cass v. Higenbotam*, 100 N. Y. 248; *Jones on Pledges*, §§ 577, 578, 580, 596, 682, 693, note, 694, 700; 710, 711, 716, 717, 719; *Story on Bailments*, §§ 289, 291, 315, 349, 351; *Porter v. Blood*, 5 Pick. 54; *Potter v. Tyler*, 2 Met. 58, 64; *Howard v. Ames*, 3 Met. 308; *Faulkner v. Hill & al.* 104 Mass. 188; *Washburn v. Pond & al.* 2 Allen, 474; *Sawyer v. Wiswell*, 9 Allen, 42; *Fay v. Gray*, 124 Mass. 500; *Bast v. Bank*, 101 U. S. 93; *Peacock v. Pursell*, 14 C. B. (N. S.) 728; *Nexsen v. Lyell & al.* 5 Hill, 466; *Stewart v. Bigler*, 98 Penn. St. 80.

In the famous case of *Cortelyou v. Lansing*, 2 Caines' Cases in Error, 213, the court said: "The payment of the money and the return of the pledge were to be concurrent acts, to be performed by each party at the same time and place. Each must show a capacity and readiness to perform; yet neither is to trust the other personally. The one was not actually to part with his money, unless the other at the same time showed a capacity and readiness to return the pledge; nor was the one to return the pledge until the other showed at the same time the capacity and readiness to pay the money; the acts being reciprocal and one dependent upon the other."

This opinion was prepared by Mr. Justice KENT, afterwards the celebrated Chancellor KENT, and is one of the most complete expositions of the rights and duties of pledgor and pledgee to be found in the history of English law.

The same doctrines are laid down by Mr. Justice STORY, in his work on Bailments, § 289; *Cutting v. Marlor*, 78 N. Y. 454; *Cass v. Higenbotam*, 100 N. Y. 248; *Bank v. Fant*, 50 N. Y. 474; *Wilson v. Little & al.* 2 Comst. 448.

The pledgee, when sued by the pledgor for the unlawful conversion of the property pledged, has the same right to recoup his debt, that the pledgor, when sued by the pledgee for the debt, has to recoup his securities unlawfully disposed of by the pledgee. *Johnson v. Stear*, 15 C. B. (N. S.) 330; *Cortelyou v. Lansing*, 2 Caines' Cases, 250; *Allen v. Dykers & al.* 3 Hill, 593; *Stearns v. Marsh & al.* 4 Denio, 227; *Wilson v. Little & al.* 2 Comstock, 443; *Baltimore Ins. Co. v. Dalrymple*, 25 Md. 269; *Bulkeley v. Welch*, 31 Conn. 339; *Ward v. Fellers*, 3 Mich. 288; *Belden v. Perkins*, 78 Ill. 449; *Fletcher v. Dickinson*, 7 Allen, 23-4; *Fisher v. Brown*, 104 Mass. 259; *Shaw v. Ferguson*, 82 Ind. 342; *Hancock v. Franklin Ins. Co.* 114 Mass. 155-57; *Wheeler v. Newbould*, 16 N. Y. 393; *Neiler v. Kelly*, 69 Penn. St. 403; *Work v. Bennett*, 70 Penn. St. 484; *Jones on Pledges*, 577, 578, 580.

In the case at bar the property pledged being notes of hand, one of which, as appears by the copy of the mortgage, then over due, and the second would be due in thirty-one days after the

note in suit was given to the plaintiff, and the remaining four notes were due yearly thereafter, it became the duty of the plaintiff to use due diligence in collecting the note over due, and the others as they should become due. *Wheeler v. Newbould*, 16 N. Y. 393; *Garlick v. James*, 12 Johns. 146; *Fletcher v. Dickinson*, 7 Allen, 23; Jones on Pledges, §§ 651, 603; *Parker v. Brancker*, 22 Pick. 46; *Washburn v. Pond & al.* 2 Allen, 474; *Hancock v. Franklin Ins. Co.* 114 Mass. 156; *Boynton v. Payrow*, 67 Maine, 587.

If taken from him by theft or robbery, without negligence or fault on his part, he would be released from all liability to account for them. *Jenkins v. Nat. Bank of Bowdoinham*, 58 Maine, 278.

The case shows that without the consent or knowledge of either the principal debtor or his surety, and without the slightest justification, he voluntarily surrendered them to a third party, thus utterly depriving the defendants of all benefit from them, and violating the duty he owed them as their trustee in the grossest manner. *Dearborn v. Nat. Bank of Brunswick*, 61 Maine, 369.

Doubtless the ruling of the learned judge at *nisi prius* was based upon certain *dicta* in *Winthrop Bank v. Jackson*, 67 Maine, 570.

All of the expressions in that opinion may not be quite in harmony with the authorities cited in this argument; but the decision of the court in that case, the result reached, was in entire accordance with every authority upon the subject. *Jenkins v. Nat. Bank of Bowdoinham*, 58 Maine, 278; *Carey v. Guillow*, 105 Mass. 18.

It is familiar law that a creditor who receives security from his principal debtor, holds it for the benefit of the surety as well as for himself; and a release of such security discharges the surety to the extent of the value of the security released. *Springer v. Toothaker*, 43 Maine, 381; *Baker v. Briggs*, 8 Pick. 122.

HASKELL, J. Assumpsit on a promissory note, signed by the defendants, and payable to the plaintiff on demand.

The defendants plead in set-off that the plaintiff had sold certain notes, which they had pledged to him to secure the payment of the note in suit, and had received the full face value thereof, exceeding the amount sued for.

When securities pledged to secure the payment of a debt are legally sold by the pledgee, he sells for his own account so far as necessary to pay his debt, and the proceeds, when received, to that extent become his own, and operate as payment; but, the balance is money "had and received" by him for the pledgor's use, and may be recovered as such, by action, or by set-off in an action by the pledgee against the pledgor. *Hancock v. Franklin Insurance Co.* 114 Mass. 155; *Potter v. Tyler*, 2 Met. 58; *Howard v. Ames*, 3 Met. 308; R. S., c. 82, § 56.

When such securities are illegally sold by the pledgee, and he has actually received money therefor, the pledgor may waive the tort, and require the money so received to be applied in payment of the debt secured, and may recover any balance of the same by action for money had and received, or by set-off; but he can only avail himself of these remedies when money, or its equivalent, has been actually received from the tortious sale, and he must be content, with the money received, as his measure of damages. *Androscoggin Water Power Co. v. Metcalf*, 65 Maine, 40; *Ware v. Percival*, 61 Maine, 391.

The evidence adduced does not tend to support the defendants' plea, but rather shows that the plaintiff wrongfully, and without receiving any consideration therefor, surrendered the securities pledged, to a stranger, who claimed to own the same. In no way have the securities been applied to the payment of the debt. The parties have not agreed to so apply them, nor have they been so dealt with by the plaintiff, that the law so applies them. The statement of the case negatives the right of set-off, inasmuch as the securities have not been sold, or in any way applied to the payment of the plaintiff's debt, leaving a balance in the plaintiff's hands for the defendants' use.

Nor, can the defendants recoup the value of the securities pledged to the extent of the amount due upon the note in suit. Recoupment would arise for some breach by the plaintiff of the

contract sued, whereby the damages claimed by him are reduced, or extinguished. The contract in suit is a promissory note, containing no stipulations whatever for the plaintiff to perform. The reciprocal rights and liabilities of the parties touching the pledge, a collateral contract, as its name implies, depend upon the performance, or breach of the principal contract, and are incident to it, but not a part of it. Stipulations touching a loan and a pledge to secure it, may be inserted in one contract, if the parties desire, so that reciprocal duties and liabilities touching both loan and pledge would flow from it, and all controversies touching both might be settled in the same suit, but that is not the case at bar. In a case in all essentials like the present, it was held that neither set-off, nor recoupment could be allowed. *Stare decisis.* *Winthrop Bank v. Jackson*, 67 Maine, 570.

Exceptions overruled.

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

SUMNER C. PARCHER, administrator,

vs.

SACO AND BIDDEFORD SAVINGS INSTITUTION.

York. Opinion December 10, 1886.

Gift, causa mortis.

To constitute a valid gift *causa mortis*, it must be made during some illness or peril of the donor, and in contemplation and expectation of death from that illness or peril, and death must also ensue therefrom.

ON report on facts agreed.

The plaintiff brings this action as administrator of the estate of Herman Peters, who was a mariner in the employ of Captain Amos Leavitt for a long time.

Mrs Marianna Leavitt went to sea a portion of the time, with her husband, Captain Amos. She persuaded Peters to save his money; in consequence of which he sent home by her or her husband, at various times, his earnings, or a portion of them, to

be deposited for him in the savings banks in Saco. He requested her to put half in each bank, (the defendant's bank and one other) so that if anything happened to one bank he would have something in the other. Mrs. Leavitt made the first deposit for him May 6, 1878, in the above named bank; opened a ledger account, and took a deposit book, each under this entry: "Mrs. Marianna Leavitt, Trustee of Herman Peters." This form of entry was made at the suggestion of the treasurer of the bank. Other deposits were made under the same entry from time to time; a part by Mrs. Leavitt and a part by Peters himself, but all from the earnings of Peters. Mrs. Leavitt, as trustee of said Peters, took originally, and kept possession of the deposit book up to the death of Peters, except when Peters took it to carry to the bank when he made deposits.

Captain Amos Leavitt died February 7, 1882. Soon after that Mr. Peters went to the bank and said, "This deposit is payable to Mrs. Leavitt in case of my death." The treasurer replied, "She has the control during your life, but it is not payable to her after your death." Mr. Peters said, "Then make it so." He was asked if he had any relatives. He replied, "Yes, but none that I want to have this deposit." Thereupon the treasurer of the bank added to the entries in the ledger and deposit book, the following words: "Payable, also, to Mrs. Leavitt in case of death of H. Peters;" and these entries remained, without further change, to the time of Peters' death. After this, Peters told Mrs. Leavitt that he wanted her to have his money in the bank when he died. She replied, "Then you must have it fixed so that I can get it." His reply to that was, "It is already fixed." This was the first that Mrs. Leavitt knew of the change in the entries in the bank books. She did not know of the change when it was made. No part of these deposits or income therefrom has been drawn by any one. This action is brought to recover the said deposits and income. Due demand was made upon the bank before the action was commenced.

The Saco and Biddeford Savings Institution was organized in Saco, in May, 1827, under an act of our legislature. In section

one, of the act of incorporation, it is stated as follows: "And all deeds, grants and conveyances, covenants and agreements made by their treasurer, or any other person under their authority and direction, pursuant to the by-laws of the corporation, shall be good and valid, and said corporation shall have power to make any by-laws for the convenient management of their concerns, not repugnant to the laws of the state."

Article 18 of the by-laws is as follows: "Depositors,—Any depositor may designate at the time of making his deposit, the period for which he is desirous the same shall remain, and the purpose for which the same is made, and such depositor and his legal representative shall be bound by such conditions by him voluntarily annexed to his deposit."

Article 21. "The act of making a deposit shall be considered sufficient assent on the part of the depositor to the by-laws and regulations of this institution."

It was agreed that if, upon the foregoing report of the case to the full court, to be carried forward by the plaintiff, the court should be of opinion that the defendant's bank is legally holden to this plaintiff for said deposits and income, the defendant is to be defaulted, and damages to be assessed by judge at *nisi prius*; otherwise the defendant is to have judgment.

H. Fairfield, for the plaintiff, cited: *Allen v. Polereczky*, 31 Maine, 338; *Dole v. Lincoln*, 31 Maine, 422; *Carlton v. Lovejoy*, 54 Maine, 445; *Robinson v. Ring*, 72 Maine, 144; *Northrop v. Hale*, 73 Maine, 69.

Edward P. Burnham, for defendant.

If the transaction be viewed as "*donatio causa mortis*," there was a sufficiently near contemplation of the approach of death, to cause the gift to take effect. Mr. Peters was a mariner and usually on voyages to ports having sickly climates; so that he had in view the usual perils of the sea, and also the dangerous sicknesses incident to southern ports. Thus in fact he died, after throat sickness in a southern port of disease contracted there. The very event took place, the probability of which he contemplated, namely, death, away from what he had for years regarded as his home.

EMERY, J. The money sued for unquestionably belonged to the plaintiff's intestate in his life-time. He earned the money and it was deposited in the defendant bank as his money and for his benefit. It would pass upon his death to his administrator, if he did not effectually dispose of it in his life-time.

It is not claimed that he made any gift *inter vivos*, but it is claimed that by causing to be made upon the bank ledger, the entry, "Payable also to Mrs. Leavitt, in case of death of H. Peters," he made an effectual gift *causa mortis*. Such gifts are not to be favored, as they conflict with the general policy of the law relating to the disposition of the estates of deceased persons. To be valid and take the property out of the general law of administration of estates, the gift must be made during some illness or peril of the donor, and in contemplation and expectation of death from that illness or peril, and death must also ensue therefrom. *Weston v. Hight*, 17 Maine, 287; *Grymes v. Hone*, 49 N. Y. 17.

This case does not disclose such circumstances, and the attempted gift was, therefore, ineffectual. The money belongs to the administrator.

Defendant defaulted. Damages to be assessed by the court at nisi prius.

PETERS, C. J., WALTON, VIRGIN, LIBREY and HASKELL, JJ., concurred.

JOHN H. HIGGINS vs. JAMES L. BROWN.

Hancock. Rescript June 26, 1886.

Duress.

Mere threats of criminal prosecution, when no warrant had been issued nor proceedings commenced, do not constitute duress.*

78	473
84	418

ON motion of the plaintiff to set aside the verdict.

Replevin of two horses. The plaintiff claimed title to the horses by virtue of a mortgage bill of sale from the defendant.

The defense was that the mortgage was procured from

* See *Charles L. Huborn v. J. A. Bucknam et al. Infra*, p.

the defendant through duress, and the verdict was for the defendant.

At the trial the defendant, being called by his counsel as a witness, testified :

Ques. You may state the circumstances, so far as you remember, of your dealings with John H. Higgins in the year 1884.

Ans. In that year a certain fellow told me, I was informed that John Higgins and Sidney Brown stole those two heifers from my pasture, one was mine and the other William——, and I called Brad Higgins over to my house, as he didn't live but a few steps, and told him the story that I heard; that I heard that those two fellows stole my heifers; and we talked there a few minutes and I told him that I afterwards went with him and saw John Higgins. I told them over there what I had heard and they wanted to know who told me, and I told them I should not tell them then, at that time, and passed back home; and in a few minutes John Higgins came over to my house and wanted to know of me if Chester Brown told me that he stole my heifers. Said I, "No." Said I, "Chester Brown didn't tell me that you stole them." Said I, "He told me that you and Sidney Brown stole them." Well, he said he was going to put Chester through for telling such a story as that about him. Said I, "I can't help what you do about that." Said I, "If there is any proof I can get about the heifers," said I, "I shall try to prove about my heifers." Well, he came to Ellsworth that day he said, and I saw nothing more of them until the time that the meeting was here, the city meeting, fall meeting, in September. I met John Higgins here on the street; he said he had seen Chester Brown, and Chester Brown said he never told me no such thing, and I was a damned liar, "and now," said he, "If you don't drop this," said he, "I will make hot work for you," and I took it he was going to burn me up, burn my buildings. There was nothing more said then for a day or two, and I went over to Bradford Higgins after my tackle that I had lent a man, rope pullies that I had lent a man to kill a beef critter there, and spoke to John Higgins about the heifers, then told him if

he would pay for my heifers I would drop it, wouldn't go any further. He said he wouldn't do no such thing, and he didn't steal the heifers, and wouldn't pay me for the heifers. He said he had something against me he was going to State's prison me for, said he had been to see as good a lawyer as there was in town. I didn't make much talk to him, but went home with my tackle. . . . When I went over this second time, John and Bradford Higgins were both present. At that time there was something said about the crime I had committed. They said I had committed a crime. John said so, and he said if I didn't come out and fix it up with them that they were going to put me in State's prison, or could do it.

Q. What did they want you to do?

A. They wanted me to give them \$100.

Q. State what was said.

A. I will state as near as I can remember. John Higgins said if I didn't come out to Ellsworth and fix up with them that he would State's prison me for a crime I had done when I was a boy, against a mare. His father and mother see me do it; and I told them I didn't know whether I would or not. I would think it over; and I went back home, and along in the evening I went there—dare'sn't stay there alone, and went over and got Herman Hooper to get him to come over and stay with me. Herman said he would come over. I met him on the road and went to his house, and stayed there and talked a few minutes, and went down back of the house the back way and stopped a few minutes, and then went down to John Carter's. I stayed and talked with John Carter a few minutes, as John lives off from the county road, passed up on the county road and passed along a little ways to the main back road that goes through from my place to Bangor, and up to the private way that goes across to my house, and when I got there I see—when we got there, Herman and I, we see two men—

Q. Where did you go next?

A. Standing in the door, and went out to see who they were, and then went into the house. John Higgins was one of them and Hollis Hooper was the other. Then we went into the house.

Herman stayed there. This was between 10 and 11 o'clock at night. Herman stayed there a little while with me, and said he must go home to feed his horse, and he was gone a few minutes and came back again. I was in my bed-room when he came, making my bed, I think, and he says: I was informed that—

Q. Did any one come to the door soon after?

A. They did. Bradford Higgins and John came to the door. I went to the door, I asked Herman to go with me, and Herman went to the door with me, and there was John Higgins and Bradford stood at the door. John Higgins said that he thought Herman was going to carry me away somewheres, and I was going to dispose of my property and run away, and "we are going to watch you to-night, and if you go away anywheres we shall telegraph after you to stop you." "Now," said he: "If you don't go to Ellsworth and fix up with us to-morrow, why, we will State's prison you," and they started away; and I went back into the house. There was nothing more stated at all—well, it was that they would State's prison me on this mare scrape, he said; and there was nothing more said till the next morning. I came to Ellsworth and they overtook me out here on the road. I don't remember justly what they said. They overtook me up to Mr. Grant's. That is about half or three-quarters of a mile from here. I had slept none for a number of nights, none to amount to anything. We came in here and they watched me around, and at last I saw John down there on the corner. He told me, said he: "Come, go up into this office and fix up with me as I want you to;" and I went up into the office. I don't remember what was done up there, to amount to anything. I know there was some papers passed to me and I signed them, and I had no more talk with them after, from that time to this, anything more than just speak.

Wiswell and King, for plaintiff.

John B. Redman, for defendant.

PER CURIAM:

The evidence in this case is not sufficient to sustain the verdict.

There is not any evidence of threats, of impending danger, or personal violence.

The threats as stated by the defendant himself amounted to nothing more than that the plaintiff was going to commence criminal proceedings.

These threats were not connected with any prosecution then pending. No warrant had been issued, or proceedings commenced. Assuming the testimony of the defendant to be true, he does not exhibit such a state of affairs as would constitute duress according to the well settled rules of law. *Harmon v. Harmon*, 61 Maine, 230.

Motion sustained. New trial granted.

MARK GRAY vs. JOSEPH L. BUCK.

Hancock. Opinion December 10, 1886.

Shipping. Insurance by one owner for himself and other owners. Action for portion of insurance money received.

Where one owner of a vessel agrees to procure insurance for two or more other owners, and does procure insurance on their part with his in one policy, and collects on that policy for a loss, each of the other owners, whose portion of the vessel was covered by that policy, may maintain an action for his proportional part of the insurance money thus collected.

ON exceptions to the ruling of the court in ordering a nonsuit.

The opinion states the case and material facts.

Charles P. Stetson, for the plaintiff.

Wiswell and King, for the defendant.

EMERY, J. In this case there was evidence from which a jury might find the following as facts.

The brig, "Isaac Carver," was practically owned in the following proportions: Mark Gray, (plaintiff) one-eighth; William D. Swasey, one-eighth; Joseph L. Buck, (defendant) one-fourth, and O. M. Gray, (the master) one-half. The

master's part was held by the plaintiff, awaiting payment therefor, but that half is not involved in this case. O. M. Gray procured insurance on his half, independently of the other owners. Mark Gray (the plaintiff) applied to the defendant, who was agent for the vessel, to procure some insurance on his eighth. Swasey also made a similar application to the defendant as to his one-eighth. It was agreed that the defendant should procure an insurance of fifteen hundred dollars for himself, Swasey and the plaintiff, on their half of the vessel, to be divided among them in proportion to their interests in that half. The defendant thereupon procured the insurance, and upon the subsequent loss of the vessel, collected the entire insurance. The plaintiff, after demanding one-fourth of the sum collected, brought this suit to recover it.

The only objection urged to the maintenance of the action upon the foregoing facts, is the non joinder of Swasey as a co-plaintiff.

We do not think the interests of the plaintiff and of Swasey were joint. They were not partners. Each owned his share individually. Each could insure his share separately, or leave it uninsured, without affecting the other. The plaintiff and Swasey did not jointly request the defendant to procure insurance upon any joint interest. Each applied for himself, and for insurance upon his own separate share. The defendant made similar arrangements with each about the insurance. He could have made different arrangements. The similarity of the contracts does not weld them into one joint contract. We think each promisee can maintain his separate action for his share of the insurance. *Owings v. Owings*, 1 Har. Gill, (Md.) 484; *Dunham v. Gillis*, 8 Mass. 462; *Bunn v. Wisner*, 3 Caines, 54; *Hall v. Leigh*, 8 Cranch, 50.

The case *White v. Curtis*, 35 Maine, 534, relied upon by the defendant, is different from this case. In that case the insurance was upon the freight in which all the owners had a common interest. They had a common interest in the profit or loss of the venture. The defendant was not an owner and had no share in the venture. He procured the insurance for the joint

account of the owners, and there was no evidence, as there was in this case, of any separate contract with either owner.

*Exceptions sustained. Action
to stand for trial.*

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL,
JJ., concurred.

EBEN W. LOWNEY

vs.

NEW BRUNSWICK RAILWAY COMPANY.

Aroostook. Opinion December 10, 1886.

Railroads. Fire set by locomotive. Negligence.

A railroad company is not liable under R. S., c. 51, § 64, for damage to a pile of sleepers deposited near its track, caused by fire communicated from one of its locomotives.

To enable the owner of the sleepers to maintain an action against the railroad company for such a damage, he must prove negligence on the part of the company, and that such negligence occasioned the fire and consequent damage.

ON motion to set aside a verdict rendered in the superior court.

The case and material facts are stated in the opinion.

Madigan and Donworth, for the plaintiff.

The verdict will stand, even if the conclusion of the court would have been different had the case been originally submitted to the court, unless manifestly against the weight of evidence, and unless it so preponderates in favor of the defendants as to authorize the court to infer that the jury acted under a mistake or were influenced by improper motives. *Darby v. Hayford*, 56 Maine, 246; *Folsom v. Skofield*, 53 Maine, 171; *Hovey v. Chase*, 52 Maine, 304.

In some of the main points the evidence is conflicting. Where such is the case, and it has been left to the determination of a jury under a clear charge, the court says that it will not grant a new trial. 58 Maine, 543; 67 Maine, 507.

78	479
85	507
78	479
87	412
78	479
84	175
78	479
89	203
89	206
89	208

The duty of determining facts is for the jury. 59 Maine, 418.

We believe that the defendant is absolutely liable for this loss, whether guilty of negligence or not; testimony was introduced showing the permanent deposit of sleepers at that point, three years, and testimony of the insurance agent that property so placed and of that character is insurable.

These characteristics, permanency of deposit and insurability, distinguish this case from that of *Chapman v. Atlantic & St. Lawrence R. R. Co.* 37 Maine, 92. Hence the verdict would be just, even if the court should fail to find the elements of carelessness and negligence, and the verdict would not be disturbed. 19 Maine, 402.

There was ample evidence for the jury to found their conclusions upon, and under the law and their finding of the facts, we believe that the court will not set the verdict aside. 62 Maine, 128; 67 Maine, 314.

Wilson and Woodward, for the defendant.

EMERY, J. If this case were within § 64, of chap. 51, of R. S., the burden would still be upon the plaintiff to prove that the fire which consumed his sleepers was communicated by the defendant's locomotive-engine. The only evidence we find of such a communication is the fact that the fire was discovered in Shaw's barn, (from which it spread to the sleepers,) within a few minutes after the passage of the engine. It may be doubted if that alone is sufficient proof.

But the case is not within the statute above cited, and the judge so instructed the jury. The instruction was correct. The statute does not include movable articles, that are only temporarily left near the railroad track and are liable to be changed at any time. *Chapman v. A. & St. L. R. R. Co.* 37 Maine, 92; *Pratt v. Same*, 42 Maine, 579.

The burden upon the plaintiff, therefore, was to prove not only that the fire was communicated by the engine, but also that the defendants were guilty of negligence, and their negligence was the cause of the communication of the fire. The communication of the fire alone does not import negligence, nor does

proof of negligence alone import that it was the cause of the fire. The negligence must be proved. Its relation as the efficient cause of the fire must also be proved. *Pierce on Railroads*, 437; *Sheldon v. Hudson River R. R.* 14 N. Y. 218; *Bachelder v. Heagan*, 18 Maine, 32; *Sturgis v. Robbins*, 62 Maine, 289; *Lesan v. Maine Central R. R. Co.* 77 Maine, 85; *State v. Same*, 77 Maine, 538.

In this case we find no evidence of such negligence, nor of its causal relation. It is urged in the argument for the plaintiff that the dampers were probably open or warped, or that ignited coals may have been blown out of the ash pan, or that the smoke stack might not have had proper appliances to arrest sparks. We do not find the evidence of them however. Indeed what evidence there was upon these points seems to negative the plaintiff's suggestions.

The verdict seems to us clearly against the law and the evidence, and it should be set aside.

If it be suggested that it is difficult to prove negligence in such a case, and that the rules of law above stated are a hardship upon the plaintiff and those situated as he is, it should be remembered that the defendants were pursuing in a lawful manner a lawful business, and one useful to the entire community. It is the general rule of law that one engaged in a lawful business and acting in a lawful manner, is liable for such injuries only as are caused by his negligence. In some actions against individuals, it may be difficult to prove that the defendant was negligent and that his negligence caused the injury, but that difficulty would be no good reason for changing the rule. *Bachelder v. Heagan*, and *Sturgis v. Robbins*, *supra*.

Verdict set aside. New trial granted.

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

CHARLES L. HILBORN

vs.

J. A. BUCKNAM and another.

Androscóggin. Opinion December 9, 1886.

Duress.

It is not duress for one who believes that he has been wronged to threaten the wrong doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution.

ON motion to set aside the verdict.

The case and material facts are stated in the opinion.

Dana and Estey and Savage and Oakes, for the plaintiff.

Actual violence is not necessary to constitute duress, because consent is the very essence of a contract, and if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because there is no consent. 7 Wallace, 215; 16 Wallace, 431; 26 Am. Dec. 374, note; 5 Hill, N. Y. 156; 12 Wallace, 150.

Duress means that degree of constraint or danger, either actually inflicted, threatened or impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. 7 Wallace, 215; 16 Wallace, 431; 26 Am. Dec. 375, note; 39 Maine, 559; 12 Wallace, 150.

A threat of criminal prosecution used to compel the giving of a promissory note may constitute duress, although the amount for which the note is given is actually due to the payee from the maker. 106 Mass. 291.

Where there is an arrest for improper purposes and without just cause, *Foss v. Hildreth*, 10 Allen, 76; *Guillaume v. Rowe*, 94 N. Y. 268; or for a just cause under lawful authority,

but for an improper purpose, *Hackett v. King*, 6 Allen, 58; 106 Mass. 295, it is duress of imprisonment.

And if the prisoner pays money to procure his release, he may undoubtedly recover it back as having been involuntarily paid. 1 Parsons on Contracts, 392, note; 6 Mass. 511; 3 N. H. 508; 8 N. H. 386; 45 Am. Dec. 159, note; 7 Wallace, 215; 26 Barb. 122; 6 Allen, 58; 10 Maine, 331; 106 Mass. 295; 21 Conn. 424.

To use criminal process to enforce the payment of a civil claim is evidence of an improper purpose. 106 Mass. 295; 6 Allen, 58; 13 Maine, 146; see 10 Maine, 331.

The imprisonment must have been originally unlawful, or must have become so by abuse of the process, so as to make it the instrument of fraud or oppression. 45 Am. Dec. 158, note; 6 Allen, 58; 10 Allen, 76; 61 Maine, 227; 69 Maine, 376.

Even if there is no actual imprisonment, but the money is paid to prevent a threatened imprisonment by one having apparent or supposed authority to make his threats good, the payment can be recovered back, for the law will not require the party to resist payment until he is actually deprived of his liberty. 61 Maine, 227; 28 Vt. 370; 45 Am. Dec. 159, note; 131 Mass. 51.

The payment must not have been simply an unwilling one, but a compulsory one, and the compulsion must have been illegal, unjust and oppressive. 45 Am. Dec. 153, note; 7 Maine, 138.

Even contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such case there is nothing but the form of a contract without the substance. 7 Wallace, 215; 16 Wallace, 431; 5 Hill, (N. Y.) 158, etc.

There must be some actual or threatened exercise of power possessed, or supposed to be possessed by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money. 45 Am. Dec. 156, note; 95 U. S. 210; 2 Dillon on Mun. Corp. § 943.

It suffices if the payment is caused on the one part by an illegal demand and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property, except by submitting to this payment. 10 Howard, (U. S.) 242; 45 Am. Dec. 156, note.

Acts of menace constitute a threat as much as if they were embodied in words.

An action for money had and received lies for money got through imposition, extortion, or undue advantage taken of the party's situation. 7 Maine, 138.

J. M. Libby and *J. P. Swasey*, for the defendants, cited: *Whitefield v. Longfellow*, 13 Maine, 146; *Eddy v. Herrin*, 17 Maine, 338; *Soule v. Bonney*, 37 Maine, 128; *Fellows v. Fayette*, 39 Maine, 559; *Harmon v. Harmon*, 61 Maine, 227.

WALTON, J. The plaintiff claims that the defendants obtained one thousand and seventy-five dollars from him by duress, and he has recovered a verdict for that amount with interest.

The only question we find it necessary to consider is whether this verdict is not so clearly against the weight of evidence as to make it the duty of the court to set it aside and grant a new trial.

We think it is. In the opinion of the court, the evidence falls very far short of establishing duress.

The case shows that the defendants had lost large quantities of meal from their mill, and that, with the aid of a detective, they had obtained such proof as satisfied them that the plaintiff, in collusion with the miller, had taken much, if not the whole of it. The plaintiff did not deny that he had taken a portion of the missing meal, but denied that he had taken so large a quantity as the defendants claimed to have lost. The defendants claimed that by a comparison of the amount of corn delivered at the mill with the amount of meal returned to them, after making a proper allowance for shrinkage in grinding, it appeared that in three years and a half they had lost not less than twenty-three hundred bushels; and they estimated their pecuniary loss, including the expenses of the investigation, at two thousand

dollars. After a negotiation which lasted the greater part of two days, the defendants finally consented to make a discount of five hundred dollars, and to take security from the miller for four hundred and twenty-five dollars, leaving one thousand and seventy-five dollars for the plaintiff to pay. To this the plaintiff assented, and the matter was so compromised and settled.

The plaintiff now claims that this settlement was obtained by duress, and that he is entitled to recover back the money paid by him on that ground. In the opinion of the court, as already stated, the evidence falls very far short of establishing duress. The plaintiff was at no time arrested. He was not in express terms threatened with arrest. It may be true, as contended by his counsel, that he was made to believe that he would be arrested if he did not settle; but no direct threats of arrest were made. But suppose such threats had been made,—suppose that instead of leaving it to inference, he had been told in so many words that if he did not settle he would be prosecuted both civilly and criminally,—still, such threats, under the circumstances disclosed in this case, would not constitute duress. It is not duress for one who believes that he has been wronged to threaten the wrong doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. It is not to be supposed that a man smarting under a sense of wrong and injury, such as the defendants in this case had suffered, will not use some such threats. It is not in human nature to exercise such restraint. It is unreasonable to expect it, and the law does not require it. The law regards it as the duty of every one who knows of the commission of a crime, to take measures to have the offender brought to justice; and it does not involve itself in the absurdity of making it unlawful for one to express to the offender an intention of doing what the law makes it his duty to do. There can be no doubt that the defendants believed, and had reason to believe, that they were sufferers by the plaintiff's wrong. By collusion with their miller, he had taken their corn or meal without their knowledge or consent, and had not accounted to them for it. He knew better than they how

much he had taken. He consented to pay them one thousand and seventy-five dollars; and, in the opinion of the court, the evidence fails to disclose any legal or equitable ground for his recovering it back. In support of this conclusion it is only necessary to refer to two recent decisions of this court. *Harmon v. Harmon*, 61 Maine, 227; *Higgins v. Brown*, 78 Maine, 473 (New England Reporter, Aug. 17, 1886).

Motion sustained. Verdict set aside. New trial granted.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

STATE OF MAINE vs. ALONZO ADAMS and another.

Sagadahoc. Opinion December 9, 1886.

Practice. Affirmation. Jurat. Fishing in Winnegance Creek. Spec. Stat. 1885, c. 463. Stat. 1885, c. 262. Pleading.

The magistrate's certificate that the complainant in a criminal prosecution affirmed to the truth of the complaint, conclusively implies that he was conscientiously scrupulous of taking an oath, and he was, therefore, permitted to affirm, and that he affirmed in the form prescribed by the statute.

To convict a person for violating any of the provisions of Priv. and Spec. L. of 1885, c. 463, enacted for the protection of bass in Winnegance Creek, it need not be shown that the notices described in Pub. L. of 1885, c. 262, were posted, the latter provision having no application to the former.

A complaint against one for using nets without the prescribed attachments thereto, in Winnegance Creek, need not allege the owner's name.

A complaint under Priv. and Spec. L. of 1885, c. 463, sufficiently setting out an unlawful using of the kind of net forbidden by § 3, and also alleging the illegal killing of bass under § 5, is not bad for duplicity, the latter allegation being in the nature of an aggravation of the former offence. And when no venue is laid for the latter it may be rejected as surplusage.

A complaint properly setting out the offence of using a net of the kind forbidden by § 3, is valid, although it alleges the forfeiture in the future tense.

ON EXCEPTIONS.

This is an appeal from the municipal court for the city of Bath, on a complaint for a violation of sections 3 and 5, of chapter 463, of the Private and Special Laws of 1885. By leave of court the respondents retracted their plea of not guilty and

demurred. The court overruled the demurrer, and the defendants alleged exceptions.

F. J. Buker, county attorney, for the state, cited: R. S., c. 134, §§ 2, 3; *Com. v. Fisher*, 7 Gray, 492; *State v. Harris*, 2 Halst. 361; *Com. v. Bennett*, 7 Allen, 533; *Com. v. Keefe*, 7 Gray, 332; *Com. v. Wallace*, 14 Gray, 382; *Com. v. McCurdy*, 5 Mass. 324; *Burnham v. Webster*, 5 Mass. 266; *Pierce v. Kimball*, 9 Maine, 56; *State v. Conley*, 39 Maine, 92.

A. N. Williams, for defendants.

At common law, to authorize a magistrate to issue his warrant for the apprehension of a supposed criminal, it was necessary that the complaint should be made under oath. 1 Chitty, C. L. 34; 4 Bl. Com. 290; 2 Hale, P. C. 108-10; *State v. J. H.* 1 Tyl. 444; *Conner v. Com.* 3 Binn. 38. Affirmation was not sufficient. 1 Chitty, C. L. 34. In fact, to be a witness in any proceeding, civil or criminal, the taking of an oath was an absolute prerequisite. 1 Chitty, C. L. 34; *Rex v. John Gardner, Esq.* 2 Burr. 1117.

Defendants say that the plain and evident construction of the constitution, taken in connection with the two sections, R. S., is to allow those persons, and those only, whose consciences revolt at taking an oath as an offence against God, to affirm. And this construction is in perfect accord with the authorities on this subject. 2 Bish. C. L. 1018; 1 Chitty, C. L. 593.

The form of the affirmation being prescribed by statute, the omission of the magistrate to incorporate into his jurat the exact substance of the statute, is fatal; *Hawkin's Pleas of the Crown*, vol. 1, c. 19, §§ 31-6; Bish. C. L. 6th ed. § 1018, and notes.

Chapter 463 of the Private and Special Laws of 1885, on which the complaint is founded, is not a general statute, but special law, and within the purview of sections 1, 2 and 4, of c. 262, of the Public Laws of 1885, above cited.

The complaint, in charging the offence of using a net without the owner's name attached, in violation of section 3, c. 463,

Private and Special Laws of 1885, fails to allege the town in which the offence was committed, and its omission is fatal to the complaint. 1 Chitty, C. L. 196; *Com. v. Springfield*, 7 Mass. 10. The complaint is bad for duplicity, there being two distinct offences set forth in one count thereof, and within the rule laid down in *State v. Palmer*, 35 Maine, 9; and *Com. v. Atwood*, 11 Mass. 93.

VIRGIN, J. The first objection is that it does not appear, either in the body of the complaint or in the jurat, that the complainant was conscientiously scrupulous of taking an oath.

Article 1, § 5, of the Constitution, authorizes the issuing of warrants on complaints "supported by oath or affirmation," and "when a person required to be sworn, is conscientiously scrupulous of taking an oath, he may affirm," (R. S., c. 1, § 7) "under the pains and penalties of perjury, with the same force and effect as an oath." R. S., c. 82, § 104.

The magistrate is to determine whether the complainant has such scruples; and on being affirmatively satisfied that he has, to permit him to affirm in the form prescribed. The magistrate's certificate that the complainant affirmed, necessarily and conclusively implies that he did entertain such scruples, and was therefore permitted to affirm. *Hall v. Hoxie*, 3 Met. 251, 254. And it seems an indictment is good which purports to be found by the grand jurors "upon their oath or affirmation," some of whom affirmed. *Com. v. Fisher*, 7 Gray, 492.

We are aware that the court in New Jersey has held otherwise; but the same court said that "were the question now to arise for the first time, we should hesitate before we gave it our sanction, . . . but feel ourselves bound to adhere to the rule established by the court on previous occasions." *State v. Harris*, 7 N. J. L. 361.

2. Whether the complainant makes oath or affirms to the truth of the allegations in the complaint, the jurat need not certify the mode and manner in which the magistrate administered it. When it recites that the complainant either made oath or affirmation to the allegations, the conclusive presumption is that it

was done according to law. *Lincoln v. Taunt. Cop. Manf. Co.* 11 Cush. 440; *Horne v. Haverhill*, 113 Mass. 344.

3. The provisions of Pub. L. of 1885, c. 262, do not apply to those of c. 463, Priv. and Spec. L. of 1885. Although the latter statute applies to particular waters, it is a public statute in its character, and prohibits all persons alike from taking bass therefrom during all seasons of the year except in the months of January and February; and in those, all persons may take them with impunity, provided they observe the regulations and restrictions prescribed as to the nets used therefor, and provided also that they do not set their nets in the flood gates of the mill dam; no person or association having any special benefit thereunder, and hence having no inducement to post and maintain the prescribed notices, without which no prosecution can be maintained.

The former statute is predicated of benefits or special rights secured to individuals or associations, who, therefore, have inducements to post and maintain notices thereof, to the end that they may enforce their rights against those of the public, who may violate the provisions by which such rights are protected.

4. Section 3 is levelled against the owner by way of forfeiting his nets "which do not have his name in legible characters branded or carved on a wooden buoy," etc.; and section 5 adds a forfeiture of twenty-five dollars. But section 3 also reaches one who is not the owner, but uses such a net as is therein prohibited. Hence ownership need not be alleged, the allegation of use being sufficient.

5. The complaint is not bad for duplicity. To the forfeiture of twenty-five dollars for a violation of any of the provisions of §§ 1, 2 and 3, section 5 adds "a further sum of five dollars for every bass illegally caught or killed" by way of aggravation of those offences, like a second conviction under R. S., c. 27. But as no venue is laid in the allegations setting out the killing, it may be rejected as surplusage, the complaint for using the net without the prescribed attachments being sufficient for the forfeiture of twenty-five dollars.

6. Following the language of the statute as to the forfeiture

and adopting the future tense, is not such pleading as the court would recommend as a precedent, but we do not think it is fatal.

Exceptions overruled. Judgment for the state for twenty-five dollars and costs.

PETERS, C. J., DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

78	490
85	96

STATE OF MAINE *vs.* CHARLES BANKS, junior, and another.

Sagadahoc. Opinion December 9, 1886.

Practice. Where accused does not testify. R. S., c. 134, § 19.

Neither the Declaration of Rights, § 5, nor R. S., c. 134, § 19, authorizes the county attorney in the trial of a criminal prosecution, to urge in argument to the jury that the defendant did not take the stand and deny the testimony introduced by the prosecution.

ON EXCEPTIONS.

Complaint, on appeal, from the municipal court of the city of Bath, by respondents, in which they are charged with violating the provision of section 2, chapter 463, of the Private and Special Laws of 1885, entitled, "An Act for the protection of Bass in Winnegance Creek."

F. J. Buker, county attorney, for the state, called attention to the decisions of the court in *State v. Bartlett*, 55 Maine, 220; *State v. Lawrence*, 57 Maine, 574; *State v. Cleaves*, 59 Maine, 298.

I do not overlook the fact that these cases were decided prior to the act, c. 92, laws of 1879, which adds this clause, "and the fact that he (the accused) does not testify in his own behalf, shall not be taken as evidence of his guilt." The jury were so instructed.

Of course it was a fact in the case to which the jury could not close their eyes, neither does the law require them to. The statute of Massachusetts says that "his (defendant's) neglect or refusal to testify shall not create any presumption against him." It was under this provision the cases of *Com. v. Harlow*, 110

Mass. 411, and *Com. v. Scott*, 123 Mass. 239, were decided, which would not apply to our law.

C. W. Larrabee, for the defendants.

VIRGIN, J. This is a complaint for "using in Winnegance Creek, a net of not less than six inches mesh," in violation of c. 463, Priv. and Spec. Laws of 1885.

A witness for the prosecution testified that he saw the net when it was taken out and was lying on the ice, and on measuring the mesh, found it to be only three inches. Neither of the defendants offered to testify. The county attorney urged in argument to the jury, that the defendants sat in court, heard the testimony relating to the size of the mesh, and did not take the stand to deny it.

In his charge to the jury, the presiding justice, after calling their attention to the above facts and instructing them, in substance, that the defendants' silence was not evidence of their guilt, that the jury must act without the defendants' testimony; that in weighing the evidence as a whole, it might make a great difference whether they testified or not; that they might own the mesh to have been less than six inches when it was not; and on the other hand they might deny it, and then that would be a fact to act upon, but that the jury had not that fact before them, proceeded as follows: "So that the county attorney was perfectly justified in calling your attention to the absence of any evidence on their part, as witnesses upon the stand, that their net was not what Mr. Frisbee described it to be. Now that is as far as the law allows you to go."

Our opinion is that the learned judge erred in allowing the jury to go thus far.

In 1864, for the first time, a person charged with the commission of a criminal offence, was made, "at his own request and not otherwise, a competent witness." St. 1864, c. 280. After this statute took effect, county attorneys, where the accused did not elect to testify, were allowed in argument to comment on the fact to the jury. *State v. Bartlett*, 55 Maine, 220; *State v. Lawrence*, 57 Maine, 574; *State v. Cleaves*, 59

Maine, 298. This practice continued for fifteen years; and while it operated favorably for innocent persons, it resulted disastrously to the guilty, who would not add perjury to the crime charged. Thereupon, the legislature, believing that the constitutional provision which declares that "the accused shall not be compelled to furnish or give evidence against himself" (Decl. Rights, § 5), like the rain descended upon the innocent and guilty alike, and looking to a more careful protection of this right, enacted that the fact that the defendant in a criminal prosecution does not testify in his own behalf, shall not be evidence of his guilt. St. 1879, c. 92, § 6; R. S., c. 134, § 19. We think the intent of the statute is that the jury, in determining their verdict, shall entirely exclude from their consideration the fact that the defendant did not elect to testify, substantially as if the law did not allow him to be a witness. *Com. v. Harlow*, 110 Mass. 411; *Com. v. Scott*, 123 Mass. 241. This the jury could not do under the instructions.

The other questions raised are settled in *State v. Adams*, 78 Maine, 486.

Exceptions sustained.

PETERS, C. J., DANFORTH, LIBBEY, FOSTER and HASKELL, JJ., concurred.

ISAAC LIBBY and HENRY D. BARTON

vs.

FRED W. BROWN.

Penobscot. Opinion December 10, 1886.

Limitations, statutes of. Payments on account. Entries of payments in account books. Evidence.

Entries of partial payments in the hand-writing of a deceased partner, in the firm books, are not admissible in evidence as proof of payments, for the purpose of removing the bar of the statute of limitations, in an action by the firm to recover the balance of the account.

ON report, on the evidence introduced in behalf of the plaintiffs, with the stipulation that if the plaintiffs had made out a case, the action was to stand for trial.

Assumpsit on an account annexed. The opinion states the material facts.

Davis and Bailey, for the plaintiffs.

The plaintiff, Barton, who kept the books and owned the claim, is dead. It is proved by Libby, his former partner, that the books were kept by Barton, that these entries are all in his hand-writing, and that they are original entries.

The plaintiff has given the best evidence, and in fact all the evidence, his case is susceptible of. If Barton had been alive, his suppletory oath would be required, but being dead, his books are competent evidence. See *Leighton & al. v. Manson*, 14 Maine, 208, and cases cited; also Green. on Evidence, §§ 117-122. The last section cited comments on the case of *Searle v. Barrington*, bearing somewhat upon the point in issue. See also *Dow v. Sawyer & als.* 29 Maine, 117, and *Pike v. Crehore*, 40 Maine, 503, as touching books kept by third parties, somewhat analogous in principle.

Barker, Vose and Barker, for the defendant, cited: *Cummings v. Nichols*, 38 Am. Dec. 501; *Bank v. Knapp*, 15 Am. Dec. 181; *Field v. Thompson*, 119 Mass. 151; *Somers v. Wright*, 114 Mass. 171; *Abbott's Trial*, Ev. 326; 1 Whart. Ev. § 685; *Towle v. Blake*, 38 Maine, 95; *Lancey v. M. C. R. R. Co.* 72 Maine, 34; *Wing v. Bishop*, 3 Allen, 456; *Faunce v. Gray*, 21 Pick. 243.

EMERY, J. This is an action by a surviving partner on an account stated. Assuming the account stated to be sufficiently proved, the action thereon is admittedly barred by the statute of limitations, unless the bar is removed by what are claimed to be partial payments.

The burden of proving such payments is on the plaintiff, and the only evidence of them he offers, are the entries of them as credits on the partnership books of the plaintiff's firm in the hand-writing of the deceased partner. Are such entries of credits admissible to prove a partial payment by defendant for the purpose of removing the statute bar, and if admissible, are they sufficient evidence for that purpose?

Where a person enters upon books, in regular course of business, what he himself does from day to day, such entries in certain cases are received as some evidence that the things were actually done. This, however, is an exception to the general rules of evidence, and is confined in narrow limits. It was said by BIGELOW, C. J., in *Townsend Bank v. Whitney*, 3 Allen, 455, that "a party is never permitted to introduce entries made by himself in support of his own case, except where they are offered to prove charges in shop books." We have found no case admitting entries of things purporting to be done by other persons who were antagonistic to him making the entry.

On the other hand, such entries as are offered in this case were offered and excluded in *Hancock v. Cook*, 18 Pick. 30. The opinion of Chief Justice SHAW in that case, we think states the law correctly and gives sound and satisfactory reasons.

It is true that it was formerly held, prior to any statute upon the subject, that an indorsement made by the holder on a note of a payment thereon, such indorsement being made before the debt was barred, was some evidence of such payment at the date of the indorsement. *Coffin v. Bucknam*, 12 Maine, 471. The doctrine of that case was soon after overthrown by statute R. S., 1841, ch. 146, § 23, now R. S., 1883, ch. 81, § 100, which declared that such indorsement shall not be sufficient evidence. We do not find that the rule of that case was ever extended beyond indorsements on the written evidence of debt. We do not think it should be. An indorsement upon the note or other written evidence of the debt, necessarily operates as a payment and to reduce the debt *pro tanto*. It becomes a part of the note. Mere credits upon a book have no such effect. The distinction between the two cases is fully recognized and stated in *Hancock v. Cook*, *supra*.

Plaintiff nonsuit.

PETERS, C. J., WALTON, DANFORTH, VIRGIN and HASKELL, JJ., concurred.

STATE OF MAINE vs. DEVEREUX N. FENLASON.

Washington. Opinion December 13, 1886.

Threats. Practice. Alibi. Sealing up verdict on the Lord's day.

Evidence of threats to burn the same building, the respondent is charged in the indictment with burning, is admissible.

If the presiding justice, in his charge to the jury, errs in assuming a matter to be uncontroverted, which a party intended to controvert, his attention should be called to the error before the jury retire.

An *alibi* is not a conclusive answer to an indictment unless the respondent proves himself to have been at so great a distance as to render it impossible that he should have participated.

Sending blank forms of a verdict to a jury after twelve o'clock Saturday night, with instructions to seal up their verdict when agreed upon, does not invalidate the verdict.

Where the party is present when a verdict is received, affirmed and recorded, and does not object to the manner of receiving and recording, he waives any irregularity that may have occurred, specially when he can not show that he was prejudiced thereby.

ON EXCEPTIONS.

This was an indictment in which it is set forth in the first and third counts that the respondent, a "dwelling house," in the night time, feloniously, wilfully and maliciously did set fire to, "and the said dwelling house," "by the setting of such fire in the night time, did feloniously, wilfully and maliciously burn and consume," and in the second and fourth counts it is set forth that the respondent, "a certain building called a barn," "in the night time, feloniously, wilfully and maliciously did set fire to with intent" "a dwelling house" "to burn and consume, and that by the kindling of said fire and burning of said barn, the said dwelling house was," "in the night time, feloniously, wilfully and maliciously burnt and consumed"; and it is further set out, in the first and second counts, that the dwelling house and barn were the property of Mary L. Munson, and in the third and fourth counts that said house and barn were the property of Frederick Munson.

John H. Gray, called by the state, testified on direct exami-

78	495
93	355

nation that he had a conversation with Devereaux Fenlason in the spring of 1885. He was talking over the matter of the trouble between his uncle Stillman and aunt Sophronia; he said if his aunt Sophronia got that property away from Stillman that the buildings would be burned. I told him to be careful how he talked; that the town had a mortgage on that property and the mortgage and notes were in my hands, and he said he did not care if they had, nevertheless there would be a brand put in inside of two months. That was in reference to the same premises upon which Munson afterwards lived, which were burned.

The respondent objected to the conversation, but the objection was overruled, and exception was duly taken.

In the charge to the jury the court used the language following, to wit:

"I do not understand that there is any controversy here in regard to this fact; that the dwelling house of Mrs. Munson was burned in the night time of the 17th of July last, I do not understand to be controverted; nor do I understand that it is materially controverted that it was done by some person with the criminal intent, wilfully and maliciously."

The respondent took exception to this expression of opinion, but no objection was made nor exception taken before the jury retired, and no such contention was made. In the charge to the jury the court made use of the following expression, namely:

"I had supposed that an alibi consisted in proving the prisoner so far away from the commission of the crime that it would be impossible for him to participate in it."

To this instruction the respondent took exception.

The case was committed to the jury at about six o'clock Saturday evening. After being out some time the jury were brought into court, and, after further instruction from the court, were required to retire and consider the case further. This was about eleven o'clock Saturday evening. After twelve o'clock Saturday night, at about half past twelve o'clock, on the Lord's day, the court still being in open session, the court directed the officer to give to the jury blank forms, with directions that when

they agreed upon a verdict they should make it in writing and seal it up. The respondent and his attorney were present when this direction and instruction was given, and they neither objected nor assented to it. Early on the morning of the Lord's day, the jury agreed upon a verdict in writing, in the words following, namely :

"The jury find the respondent is guilty in manner and form as charged against him in the second count of the indictment, and not guilty as charged in the first, third and fourth counts.

Ladwick Holway, Foreman."

This verdict was sealed up, and the jury was then allowed to separate. On Monday morning the jury came into court, more than twenty-four hours after they had separated, and the sealed verdict was opened and read. By direction of the court the clerk made this inquiry of the foreman, namely :

Was any person lawfully within the house at the time it was burned? To this inquiry there was no direct response, and it does not appear that the jury had considered or formed any opinion on this point, further than that expressed in these words of the foreman, namely :

Court: Mr. Clerk, you may inquire of the foreman whether they found that no person was lawfully in the house.

Clerk: What say you, Mr. Foreman, was any person lawfully within the house at the time it was burned?

Foreman: The house that was burned?

Court: It means whether any person was actually, lawfully in it, when it was burned. You remember I instructed you that the evidence was such that you could not find that any person was lawfully in the house at the time.

Foreman: The house was burned by taking fire from the other buildings.

Court: The inquiry is whether the jury were satisfied that no person was in fact lawfully in the house at the time it was burned?

Foreman: I should say not.

Court: The jury were of that opinion?

Foreman: The indictment was read over and voted on it individually as our understanding of it.

Court: Under the instruction I gave you I think you should further find as follows: "And the jury further find that no person was lawfully in the house at the time it was burned, and this should be signed by you and affirmed by the jury."

Under the instructions of the court the following finding was reduced to writing: "And the jury further find that no person was lawfully in the dwelling house at the time it was burnt," and signed by the foreman.

The verdict and this finding were separately affirmed, and by request of the respondent's attorney the jury was polled, and the verdict and said finding were affirmed by each individual jurymen, personally.

All the proceedings in receiving and affirming the verdict and directing and taking the special finding, were in the presence of the prisoner and his counsel, and no objection was made or exception taken thereto.

The court was not adjourned Saturday, but took a recess till Monday.

In his charge to the jury the judge instructed them, if they found the prisoner guilty, to find also that there was no person lawfully in the house, as the evidence would not authorize any other finding.

To this the respondent takes exception.

A transcript of the charge is a part of the exceptions.

E. E. Livermore, county attorney, for the state, cited: *Whart. Crim. Ev.* (8th ed.) § 756; *McLellan v. Wheeler*, 70 Maine, 285; *State v. Reed*, 62 Maine, 129; *Bradstreet v. Bradstreet*, 64 Maine, 206; *State v. Benner*, 64 Maine, 267; *Grows v. M. C. R. R.* 69 Maine, 412; *Webster v. Folsom*, 58 Maine, 230; *Maxwell v. Mitchell*, 61 Maine, 106; *Lord v. Kennebunkport*, 61 Maine, 462; *Oxnard v. Swanton*, 39 Maine, 125; *Hoghtaling v. Osborn*, 15 Johns. 119; *Hurdekoper v. Collin*, 3 Watts. 59; *True v. Plumley*, 36 Maine, 466; *Anon.* 63 Maine, 590.

George M. Hanson and Edgar Whitten, for the defendant.

The evidence offered must correspond with the allegations, and be confined to the point in issue. This rule excludes all evidence of collateral facts. 1 Green. Ev. § § 50, 51, 52.

The allegation in the writ was "burning and destroying the plaintiff's shop, with the goods therein." In *Lord v. Moore*, 37 Maine, 217, a witness testified to conversations had "with the defendant to blow up a building of one Stackpole." The court held that "declarations of the defendant, relating to matter in no wise connected with the subject matter then before the jury, could not properly be admitted in evidence."

Matter of fact is within the province of the jury; and the refusal of the judge to reject it may have given it importance in their minds; and with no means of ascertaining that it did not, an exception for this cause is well taken. *Warren v. Walker*, 23 Maine, 460; *Lord v. Moore*, 37 Maine, 221.

The justice presiding expressed an opinion in his charge to the jury, that it is not "materially controverted" that the house of Mrs. Munson was burned by some person with the criminal intent, wilfully and maliciously, which is in direct contravention of § 83, c. 82, of the R. S.

If an instruction be given to the jury which leaves them to draw an incorrect inference from facts, material to the issue, the verdict will be set aside. *Hastings v. Bangor House Proprietors*, 18 Maine, 436.

An instruction to the jury inapplicable to the facts of the case and calculated to have an influence on the verdict, is an error sufficient to cause the verdict to be set aside. *Pierce v. Whitney*, 22 Maine, 113.

An alibi need not be proved beyond a reasonable doubt. Therefore the terms "possible" and "impossible" in the instruction of the court with reference to the proof of it, are too strong.

If the evidence touching an alibi is sufficient to raise a reasonable doubt of the defendant's guilt in the minds of the jury, it should be considered, although the alibi does not cover the whole time during which the crime was committed. *Waterman's U. S. Crim. Digest*, 165-6, and cited cases.

The court was in session, and instructions sent to the jury on the Lord's day. *Dies Dominicus non est juridicus*. No court shall be held on Sunday. R. S., c. 77, § 48.

By the Sunday law of Massachusetts, the legislature intended to prohibit secular business on the Lord's day, and not confine the prohibition to manual labor. *Pattee v. Greeley*, 13 Metcalf, 286.

Secular business should be performed on a secular day. *State v. Suhur*, 33 Maine, 540.

In a criminal case, the oral verdict pronounced by the foreman in the open court can not be received, unless it is shown to accord substantially with the form sealed up by the jury before their separation. *Com. v. Tobin*, 125 Mass. 206.

A privy verdict cannot be given in treason and felony. 3 Blacks. Com. 377, Chitty's note; 4 Blacks. Com. 360, Christian's note.

The weight of authority in Massachusetts appears to be, that in trials for misdemeanors only, the jury may be allowed to separate, but that in cases where the punishments are extreme, they should not be permitted to do so. *Com. v. Durfee*, 100 Mass. 149; *Com. v. Dorus*, 108 Mass. 488; *Com. v. Carrington*, 116 Mass. 39.

In misdemeanors, and in some states in felonies not capital, the court may, with the defendant's consent, permit the jury to separate, and bring in a sealed verdict. Whart. Crim. Plead. & Practice, c. 15, § 749, (8th ed.)

The jury were allowed to separate before they had agreed upon their verdict, as recorded.

After the jury had sealed up their verdict and had separated, the court could not have sent them back to reconsider the verdict, without the assent of both parties, and had they so done, without such assent, it would have been good cause for setting it aside. *True v. Plumley*, 36 Maine, 476; *Com. v. Durfee*, 100 Mass. 149.

Since the statute of 1872, c. 82, went into effect, assault and battery has been a felony. Though prior to 1872, the maximum imprisonment therefor was less than one year, the legislature

has increased the maximum to a term not exceeding five years, and thereby made the offense a statute felony. *State v. Goddard*, 69 Maine, 181.

Crimes referred to in § 12, of c. 126, R. S., as punishable by imprisonment in the state prison, are such as are liable, by statute, to be thus punished, and not only such as must be thus punished. *State v. Mayberry*, 48 Maine, 236.

EMERY, J. I. As to the admission of the testimony of Gray about threats made by the respondent to burn the building.

Evidence of prior threats by a respondent to do the particular act he is charged with doing, is clearly admissible. No citation of authorities is needed to establish this proposition. The threats testified to by Gray were threats to burn the same building the respondent was charged with burning. It is urged in the argument that the ownership of the building had changed between the time of the threats and the time of the burning. The bill of exceptions does not state any such change of ownership. If there had been such a change it would weaken the force of the evidence, but we doubt if it would entirely exclude it. The evidence would still have some tendency to prove some element of the crime charged, the act, the intent, the malice, or at least the disposition of mind of the respondent.

II. As to the presiding justice's statement in his charge of what was uncontroverted.

It is the duty of the presiding justice to present the case to the jury as plainly as possible. He should eliminate uncontroverted matters and distinctly point out the precise issues. If he errs in assuming a matter to be uncontroverted which a party intended to controvert, his attention should be called to the error before the jury retire, that he may make proper corrections. Rule XI. *Murchie v. Gates*, 78 Maine, 300. In this case no objection was made to the judge's statement of the controversy, and indeed the bill of exceptions states that no such contention was made as the counsel now suggests. We therefore assume that the controversy was correctly stated.

III. As to the expression in the charge upon the matter of the respondent's attempted *alibi*.

It is true, the respondent need not prove his *alibi* beyond a reasonable doubt. He may show where he was at the time the act was committed, and perhaps the farther off he was from the scene of action, the more doubt he raises as to his guilt. Still he may have participated, though at a distance, and hence distance is not a conclusive answer to the indictment, unless it be so great as to render it impossible for him to have participated in the crime. It appears from the charge (the whole charge being made a part of the bill of exceptions) that the respondent's counsel had claimed in his argument to the jury, there was "the most perfect proof of an *alibi*," while the testimony of the respondent's own witnesses showed that he was within twenty-five rods or thereabouts. The judge suggested to the jury to ascertain if the respondent was near enough to assist by giving warning or otherwise, and then in alluding to the counsel's claim that an *alibi* was proved, used the expression complained of. Counsel seemed to contend that proof of any distance was proof of *alibi*, and hence a conclusive answer to the indictment. The judge simply stated in effect, that to make mere distance a conclusive answer, as an *alibi*, it must be shown to be so great as to render it impossible for the respondent to have participated. This was correct.

IV. As to the Sunday proceedings.

It is settled in this state that a jury may deliberate on Sunday and may write out and seal up their verdict on Sunday. *True v. Plumley*, 36 Maine, 466. The weight of authority is in favor of the proposition that the court may receive a verdict on Sunday, the case having gone to the jury before Sunday. *Hoghtaling v. Osborn*, 15 Johns. 119; *Hurdekoper v. Collins*, 3 Watts, 56; *Baxter v. People*, 3 Gil. 368, cited with approval in *True v. Plumley*; see also *Van Riper v. Van Riper*, 1 Southard, 176; *Webber v. Merrill*, 34 N. H. 202; *State v. Ricketts*, 74 N. C. 187; *Reed v. State*, 53 Ala. 502; see also notes to 12 Am. Dec. 291.

If the jury may deliberate on Sunday and write out and seal

up their verdict on Sunday, if the court may receive the verdict on Sunday, it would seem the presiding justice might on Sunday send blank forms to the jury with instructions to write out and seal up the verdict when agreed upon, without thereby invalidating the entire proceedings.

V. As to the sealing the verdict and the separation of the jury, before returning the verdict into court and there affirming it.

It was resolved by this court as reported in 63 Maine, 590, that in any criminal case, where the punishment was not death or imprisonment for life, the jury might lawfully seal up their verdict, when agreed upon, and might then separate during a temporary adjournment of court. In this case the judge, in his charge, had expressly instructed the jury that the evidence showed no person lawfully in the house at the time of the firing, and that they must so find. This lowered the grade of the offence, from one necessarily punishable by life imprisonment, to one only discretionally so punishable. No verdict could be recorded for the greater offence. It is contended by the state that the case, at the time of the giving the directions to seal up the verdict, was thus one within the resolution of the court above cited.

But however all this may be, and whatever might be our duty if the respondent had seasonably objected to what he now calls irregularities, it appears from his bill of exceptions that he and his counsel were present in court and saw all these things done and made no objection. No intimation was given to the presiding justice that the respondent or his counsel had any objection to any of these proceedings, or regarded them as possibly detrimental, or even irregular. An objection from the respondent would probably have prevented them. He probably saw no harm in them. They were not matters of substance. They were matters of purely formal procedure, which perhaps he might have insisted should be carried on after strict, ancient forms, but he did not so insist, nor even suggest. Having thus tacitly waived the irregularity, if any, and having permitted, without remonstrance, the court to order things for the admitted convenience of all persons concerned, he should not now have

these proceedings quashed and another trial ordered, unless it appears he was at least probably prejudiced by the alleged irregularities. After conscientious study and reflection upon the case, we are satisfied that no harm was likely to come to him, and none did in fact come to him from the proceedings now complained of.

VI. As to the direction of the presiding justice to the jury to sign and return the special finding.

This direction and the consequent special finding that no person was lawfully in the house at the time of the firing, was clearly for the benefit of the respondent. He did not object to it, and was not prejudiced by it.

*Exceptions overruled. Judgment
on the verdict.*

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL,
JJ., concurred.

ABRAHAM MERRITT and another, in equity,

vs.

HENRY W. BUCKNAM.

Washington. Opinion December 20, 1886.

Wills. Devise. Annuity as a charge upon a devise.

Where real estate is devised upon condition that the devisee shall pay an annuity to a certain church, the annuity becomes a charge upon the estate devised; and it will be enforced in equity by a sale of the estate.

When such a charge upon real estate is enforced by a sale of the estate, the costs and expenses of sale, the amount of all annuities due and unpaid with interest and a sum sufficient to produce the annuity in the future will be taken from the proceeds of sale, and the residue paid to the devisee or his grantee.

BILL in equity reported by the presiding justice, with the consent of the parties, upon bill, answer and demurrer.

The plaintiffs are trustees under the will of Louisa J. Bucknam, and bring the bill praying that the land devised to Hiram Coffin under the fifth item of her will, be sold, and out of the proceeds the

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unpaid installments due the church be paid, and from the balance a sum be placed at interest sufficient to produce fifty dollars a year.

"Fifth. I give and bequeath to Hiram Coffin, his heirs, etc., the remainder of my homestead farm, all my right, title and interest in the same, upon conditions as follows, viz. : That he pay annually the sum of fifty dollars to the Methodist E. church in Columbia village, for the support of preaching the gospel, or if the said Hiram choose to pay the principal, of which the above sum is the interest, all at one time or in payments within — then my executors hereinafter named shall give a good and sufficient deed to the said Hiram Coffin, his heirs, etc., which shall be as good and binding as if given by me, and the principal, if paid by the said Hiram, shall be placed in the hands of trustees hereinafter named, who shall put the same at interest as a fund forever, and the interest accruing from the same shall be expended for the support of the preaching of the gospel in the village of Columbia, as before requested. But if the said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the farm before named to the M. E. Church in Columbia village, to go into the hands of the trustees hereinafter named and their successors, who are to dispose of the same and put the proceeds at interest as a fund forever, and the interest of said fund only shall be expended for the support of the gospel, as before named."

Coffin paid the fifty dollars annually to the church each year after the death of testatrix, until 1879. In October, 1880, he conveyed the premises by quitclaim deed to the defendant, for the nominal consideration of one hundred and forty-one dollars. Since that time the annuity has not been paid.

William Freeman, for the plaintiffs, cited: On statute of frauds; *Duffy v. Patten*, 74 Maine, 400; *Herrin v. Butters*, 20 Maine, 119; *Hearne v. Chadbourne*, 65 Maine, 302; *Farwell v. Tillson*, 76 Maine, 238; *Doyle v. Dixon*, 97 Mass. 212; *Brown*, Stat. Frauds, c. 13, § § 272, 273, 278.

The annuity was a charge upon the estate. *Bugbee v. Sargent*, 23 Maine, 269; *Merrill v. Bickford*, 65 Maine, 118; *Knighly v. Knighly*, 2 Ves. Jr. 331; *Lupton v. Lupton*, 2

Johns. Ch. 623; *Harris v. Fly*, 7 Paige, 421; *Sands v. Champlin*, 1 Story, 376; Perry, Trusts, § § 121, 568; *Stanley v. Colt*, 5 Wall. 119; *Wright v. Wilkin*, 2 B. & S. 232; *Kirk v. Kirk*, L. R. 21 Ch. Div. 434; Hill, Trustees, *362; *Potter v. Baker*, 2 Eng. L. & Eq. 92; *Bent v Cullen*, L. R. 6 Ch. App. 238; *Ryan v. Dox*, 34 N. Y. 307; *Hassam v. Barrett*, 115 Mass. 256.

E. B. Harvey and *Charles Peabody*, for defendant.

The devise to Hiram Coffin was a fee simple with a conditional limitation which has been by this court declared void in *Merritt v. Bucknam*, 77 Maine, 253.

This leaves the fee absolute in Coffin and his assigns. The whole estate passed by the devise; nothing remained to descend to the heirs as in a devise upon condition. See *Brattle Square Church v. Grant*, 3 Gray, 142.

The will gives no lien upon the property to secure the annuity.

Coffin's assigns are no where mentioned in the will. The condition can not be broken by any act of his. *Page v. Palmer*, 48 N. H. 385; *Emerson v. Simpson*, 43 N. H. 475; Wash. on Real Prop. vol. 2, p. 6, § 5.

EMERY, J. I. The first question is whether the annual payments to the Methodist Episcopal Church, provided for in the fifth clause of the will, are a charge upon the land devised in the same clause to Coffin. We think they are. Similar language, and even language less clear, in other wills, has been held to impose a charge on the land. *Bugbee v. Sargent*, 23 Maine, 269; *Merrill v. Bickford*, 65 Maine, 118; *Birdsall v. Hewlett*, 1 Paige, Ch. 32; Pom. Eq. § 1246, note 2. "It is well settled that where a legacy is given, and is directed to be paid by the person to whom real estate is devised, such real estate is charged with the payment of the legacy." EARL, J., in *Brown v. Knapp*, 79 N. Y. 143. "When an estate is on condition of, or subject to, the payment of a sum of money, or where the intention of the testator to make an estate specifically devised, the fund for the payment of a legacy, is clearly exhibited, such legacy is a charge upon the estate. SHEPLEY, J., in *Bugbee v. Sargent*, *supra*.

It is evident the testatrix intended to make the church secure of her bounty, and to bind the land as such security. She declared the devisee should have a deed, *after* securing to the church its legacy. She also declared that in case the devisee failed to pay the legacy, the land itself should be held by the trustees for the church. This last proviso was ineffectual, as was held in *Merritt v. Bucknam*, 77 Maine, 253, but it is proper evidence of her intention to bind the land to the payment of the legacy.

II. The next question is how this charge or lien upon the land shall be enforced.

It is not a mortgage according to the Maine doctrine of mortgages, which is that the mortgagee has the legal estate. The beneficiaries have no remedy at law against the land. 77 Maine, 253. They cannot make use of any of the statute modes for foreclosing a mortgage. Their claim upon the land is simply a lien, recognized by the law, but not amounting to any legal estate. It is analogous to a mortgage according to that doctrine of mortgages which obtains in some states, and which is that the legal estate is in the mortgagor, and that the mortgagee has "a potentiality to follow the land by proper proceedings and condemn it for payment." Pom. Eq. § 1188. The rights of these beneficiaries would seem to be "to follow the land by proper process and condemn it for the payment" of their legacy. This can only be done by some process and decree in equity, for process and judgment at law are clearly unsuitable and ineffectual.

In those jurisdictions where mortgages are held to be liens only, the usual procedure to enforce them is by process in equity and decree for the sale of the land, and the payment of the debt out of the proceeds, and the payment of the residue to the mortgagor. Pom. Eq. 1228; Jones on Mortgages, 1443. Such a procedure and decree seem applicable to this case, the tenant, the holder of the legal estate, having neglected and refused to pay the annuity to the church. Such a decree is what is prayed for in this bill. In the cases cited upon the question whether the legacy is a charge upon the land, it was assumed and not questioned that process in equity was the proper process.

III. The next question is the amount to be raised out of the land. The respondent has expressly refused to pay the annuity and denies the right of the complainant thereto. To effect the evident intention of the testatrix to make the church secure of her bounty, and to fully effectuate her charitable purpose, it seems necessary that a fund should be raised out of the land sufficient at least to produce fifty dollars per year, if invested at six per cent interest. A sufficient sum at that rate is all that is asked for in the bill, as a principal. The arrearages stated in the bill, and that have since occurred, should also be provided for, with interest on each installment from November 1st of each year to the day of sale.

As this is not an action against the respondent to enforce any agreement of his, the statute of frauds, as urged in the argument, does not apply.

As the legacy to the church was for a charitable purpose, and no claim is now made to any estate in the land, there is no violation of the rule against perpetuities, in giving this effect to the will of the testatrix.

The judgment and decree of the court should be, that the complainants have a lien on the land described in the bill, for the payment of the legacies therein described; that a master be appointed to sell said land, and make conveyance thereof, and from the proceeds to pay the costs and expenses of sale, and then pay to the complainants eight hundred and thirty-three dollars and thirty-three cents as principal, and also the amount of the annual payments in arrears at the time of sale, with interest on each from November 1st of the year when due, and to pay the residue to the respondent; that the time, place, notice, and manner of sale, and other details be fixed in the decree appointing the master; that the complainants recover costs of suit, and have execution therefor.

*Demurrer overruled. Decree for complainants
as above stated in the opinion.*

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL,
JJ., concurred.

EUGENE R. PATTERSON, by his next friend,

vs.

R. WALLACE NUTTER.

Penobscot. Opinion December 20, 1886.

School-master. Punishment of pupils.

A school-master is not liable for inflicting corporal punishment upon a pupil, if it is not clearly excessive, in the general judgment of reasonable men. It is error to instruct a jury that such punishment is lawful if it is not so clearly excessive "that all hands at once say it was excessive," or "that all hands would instinctively rise up and say 'that is excessive, that is beyond judgment.'"

ON EXCEPTIONS.

An action on the case for assault and battery by a pupil against a school-master.

Crosby and Crosby, for the plaintiff, cited: *Com. v. Randall*, 4 Gray, 36; 1 Hawk. c. 60, § 23; 1 Russell, Crimes, (7 Am. ed.) 755; Bac. Abr. "Assault and battery"; *Hathaway v. Rice*, 19 Vt. 102; *Lander v. Seaver*, 32 Vt. 114; *Danenhoffer v. State*, 35 Am. Rep. 216 (69 Ind.); *Elkins v. B. & A. R. R. Co.* 115 Mass. 190; *Lynch v. Smith*, 104 Mass. 52; *Brown v. E. & N. A. Ry Co.* 58 Maine, 384; *W. & G. T. R. R. Co. v. Gladmon*, 15 Wall. 401; *Nourse v. Parker*, 138 Mass. 307.

Morrill Sprague and *John Varney*, for defendant.

The teacher can inflict corporal punishment, and when in his judgment this remedy is inadequate, he can suspend. He alone is to judge which remedy to adopt. *State v. Burton*, 45 Wis. 150; S. C. 30 Am. Report, 709.

"Within the sphere of his authority, the master is the judge when correction is required." *State v. Pendergrass*, 2 Devereux & Battle, 365 (N. C.); S. C. 31 Amr. Dec. 416.

Courts are very cautious about interfering with the honest exercise of the discretionary powers of school officers. *Hodgkins v. Rockport*, 105 Mass. 475.

The presumption of law is that the degree of punishment is in accordance with the exercise of an honest judgment, and that the punishment is without malice and not excessive. *Anderson v. State*, 3 Head. 445 (Tenn.); *Lander v. Seaver*, 32 Vt. 114; *State v. Mizner*, 50 Iowa, 152.

The teacher is liable only when the punishment is of a nature to cause a permanent injury to the body or health, or that it was inflicted through malicious motives. This rule was announced in *State v. Pendergrass*, before cited, and has been approved in the following cases: *State v. Burton*, *supra*; *State v. Stalcap*, 2 Iredel, 50; *State v. Black*, Winst. 266; *State v. Rhodes*, Phil. 453; *State v. Alfred*, 68 N. C. 322; *Com. v. Seed*, 5 Pa. L. J. 78; Reeves on Doms. Relations, 228.

The punishment should not be of a nature to cause permanent injury, or be inflicted through malice, and the teacher should exercise reasonable judgment and discretion, and not use unreasonable and disproportionate violence or force, either in mode or degree of correction, considering the nature of the offence, the age, sex and power of endurance of the offender. This rule was announced in *Com. v. Randall*, 4 Gray, 36, and approved in *Lander v. Seaver*, 32 Vt. 114; *Anderson v. State*, *supra*; *State v. Mizner*, *supra*; *Cooper v. McJunkin*, 4 Ind. 291; *Danenhoffer v. State*, 69 Ind. 295.

In *Hathaway v. Rice*, 19 Vt. 102; again, *Lander v. Seavey*, 32 Vt. 114, a civil action for damages where a boy was punished for calling his teacher names outside the school, the court say, "A school-master has the right to inflict reasonable corporal punishment."

The right to punish being a legal right, the inflicting of punishment a legal act, no action can be maintained for injuries from a casualty purely accidental arising therefrom. *Brown v. Kendall*, 6 Cush. 292.

A teacher has the right to use sufficient force to compel obedience to his authority and lawful commands, rules and regulations. If he is not capable of compelling obedience himself, he has right to call others to his assistance. *Stevens v. Fassett*, 27 Maine, 266.

EMERY, J. Free political institutions are possible only where the great body of the people are moral, intelligent, and habituated to self-control, and to obedience to lawful authority. The permanency of such institutions depends largely upon the efficient instruction and training of children in these virtues. It is to secure this permanency that the state provides schools and teachers. School teachers, therefore, have important duties and functions. Much depends upon their ability, skill and faithfulness. They must train, as well as instruct their pupils. R. S., c. 11, § 97. The acquiring of learning is not the only object of our public schools. To become good citizens, children must be taught self-restraint, obedience, and other civic virtues.

To accomplish these desirable ends, the master of a school is necessarily invested with much discretionary power. He is placed in charge some times of large numbers of children, perhaps of both sexes, of various ages, temperaments, dispositions, and of various degrees of docility and intelligence. He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board. In *State v. Pendergrass*, 2 D. & B. (N. C.) 365, (S. C. 31 Am. Dec. 416), it was said: "One of the most sacred duties of parents is to train up and qualify their children for becoming useful and virtuous members of society; this duty can not be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with the power to administer moderate correction, when he shall believe it to be just and necessary. The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power. The law has not undertaken to prescribe stated punishments for particular offences, (by a pupil) but has contented itself with the general grant of the power of moderate correction, and has

confided the graduation of punishments, within the limits of this grant, to the discretion of the teacher."

This power of moderate correction unquestionably includes corporal punishment. Authorities are not needed for this proposition. The subject was incidentally considered in *Stevens v. Fassett*, 27 Maine, 296, and it was declared by this court, through Judge SHEPLEY, that personal chastisement was lawful in our schools, and was properly resorted to where milder means of restraint were unavailing. Indeed, the plaintiff's counsel does not question that personal chastisement has been the practice, and has often been declared to be lawful. He eloquently urges, however, that corporal punishment is a "relic of barbarism," that it has been abolished in the army and navy, and has been forbidden in many schools by school boards. He urges that the greater humanity and tenderness of this age should not tolerate it in any schools, and that the courts of this day should not recognize it as a proper mode of school punishment. Whatever force this argument might have with legislatures or school boards, it should not move the court from the well established doctrine.

The extent of the school-master's discretion in the exercise of this power of personal chastisement, is the only question here; and upon this question we think the law is well and correctly stated in *Lander v. Seaver*, 32 Vt. 114, as follows: "A school-master has the right to inflict reasonable corporal punishment. He must exercise reasonable judgment and discretion, in determining when to punish and to what extent. In determining what is a reasonable punishment, various considerations must be regarded, the nature of the offence, the apparent motive and disposition of the offender, the influence of his example and conduct upon others, and the sex, age, size and strength of the pupil to be punished. Among reasonable persons much difference prevails as to the circumstances which will justify the infliction of punishment, and the extent to which it may properly be administered. On account of this difference of opinion and the difficulty which exists in determining what is a reasonable punishment, and the advantage which the master has, by being

on the spot, to know all the circumstances, the manner, look, tone, gestures and language of the offender, (which are not always easily described) and thus to form a correct opinion as to the necessity and extent of the punishment, considerable allowance should be made to the teacher by the way of protecting him in the exercise of his discretion. Especially should he have this indulgence when he appears to have acted from good motives and not from anger or malice. Hence the teacher is not to be held liable on the ground of the excess of punishment, unless the punishment is clearly excessive, and would be held so in the general judgment of reasonable men. If the punishment be thus clearly excessive, then the master would be liable for such excess, though he acted from good motives in inflicting the punishment, and in his own judgment considered it necessary and not excessive; but if there be any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt." The foregoing statement of the law is well supported by the authorities cited in the notes to that case, in 76 Am. Dec. 163.

Now comparing the judge's rulings in this case with the above clear exposition of the law, it will be seen that in one respect at least, there was error. It is true the master should not be held to have exceeded his discretion and thus become liable as a trespasser, unless the punishment is clearly excessive; but the judge ruled that the punishment must be so clearly excessive "that all hands would at once say it was excessive," and again in another place, that the punishment must be so great that "all hands would instinctively rise up and say, 'that is excessive, that is beyond judgment.'" The true criterion as expressed in *Lander v. Seaver, supra*, is "the general judgment of reasonable men." Reasonable men are those who think and reason intelligently. Their general judgment is the common result of their reflection and reasoning. The correct rule holds the teacher liable if he inflicts a punishment which the general judgment of such men, after thought and reflection, would call clearly excessive. The

rule given at the trial of this case, however, would permit a teacher to proceed in severity of punishment until it became so great as to excite the instant condemnation of all men, the stupid and ignorant as well as the rational and intelligent. Such a ruling is clearly wrong and there should be a new trial.

It is not necessary to consider the other exceptions in detail. They are mostly covered by the general propositions above laid down. We have stated these propositions at some length in view of their importance to school officers, teachers and pupils.

Exceptions sustained. New trial granted.

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

JUDSON BRIGGS vs. SAMUEL N. HODGDON and another.

Piscataquis. Opinion December 24, 1886.

Money had and received. Attachment. Amendment. Attorney at law. Estoppel. Practice.

An attachment upon a writ containing a count for money had and received, without a specification of claim, creates no lien upon real estate. When the truth of a return of a levy upon execution is not denied, the same may be amended by the officer, who made it, by signing the same; but ordinarily, by saving the rights of innocent purchasers.

When an attorney at law is employed, to sue a debt, attach real estate, procure a judgment, and levy the same upon the land attached, he is forever estopped from denying the validity of his own work, to his own profit or advantage. When the attachment and levy that he was called upon to make are defective, and he purchases the land levied upon, the title that he takes, at once enures to the judgment creditor, and he is estopped to deny the judgment creditor's title to the land.

A record that discloses the relation of attorney and client, touching a levy upon real estate, is notice to subsequent purchasers from the attorney, that he cannot dispute the validity of the levy, and take an after-acquired title to the land levied upon, in his own right.

ON REPORT.

The opinion states the case.

Ephraim Flint for the plaintiff, cited, upon the question of amendment:

Howard v. Turner, 6 Maine, 106; *Glidden v. Philbrick*, 56 Maine, 222; *Gilman v. Stetson*, 16 Maine, 124; *Spear v. Sturdivant*, 14 Maine, 268; *Com. v. Parker*, 2 Pick. 550; *Adams v. Robinson*, 1 Pick. 461; *Childs v. Barrows*, 9 Met. 413; *Sharp v. Kennedy*, 50 Ga. 208; *Rutherford v. Crawford*, 53 Ga. 138; *Wilton Mfg Co. v. Butler*, 34 Maine, 431; *Fairfield v. Paine*, 23 Maine, 508; *Cleavinger v. Reimar*, 3 Watts & S. 486; *Hackinbury v. Carlisle*, 5 Watts & S. 348; *Galbraith v. Elder*, 8 Watts, 81; *Henry v. Raimar*, 25 Pa. St. 354; *Whittier v. Varney*, 10 N. H. 291; *Knight v. T aylor*, 67 Maine, 594; *Thatcher v. Miller*, 13 Mass. 270.

Upon the question of disseizin by plaintiff:

Props. Kennebec Purchase v. Springer, 4 Mass. 410; *Props. Kennebec Pur. v. Laboree*, 2 Maine, 275; *Robison v. Swett*, 3 Maine, 316; *Gore v. Brazier*, 3 Mass. 523; *Bartlett v. Perkins*, 13 Maine, 87; *Bryant v. Tucker*, 19 Maine, 383; *Nickerson v. Whittier*, 20 Maine, 223; *Nason v. Grant*, 21 Maine, 160; *Allen v. Thayer*, 17 Mass. 299; *Bigelow v. Jones*, 10 Pick. 164; *Allen v. Taft*, 6 Gray, 552; *Boothby v. Hathaway*, 20 Maine, 251; *Hurd v. Cushing*, 7 Pick. 169; *Woodman v. Bodfish*, 25 Maine, 317; *Clark v. Pratt*, 55 Maine, 546.

Upon the question of effect of deed to plaintiff's attorney: *Cleavinger v. Reimar*, 3 Watts & S. 486; *Hackinbury v. Carlisle*, 5 Watts & S. 348; *Galbraith v. Elder*, 8 Watts, 81; *Parker v. Carter*, 4 Mundf. 273; *Hister v. Davis*, 3 Yeates. 1; *Holt v. Holt*, 1 Ch. 191; *Whalley v. Whalley*, 1 Vern. 484; *Saund. Uses*, 240; *VanHorne v. Fonda*, 5 Johns. Ch. 407; *Henry v. Raiman*, 25 Pa. St. 354.

Upon the question of notice to subsequent purchasers: *Bates v. Norcross*, 14 Pick. 224; 2 Wash. R. P. 480; *Fairbanks v. Williamson*, 7 Maine, 100; *Pike v. Galvin*, 29 Maine, 183; *Somes v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 326.

Peregrine White for defendants.

The writ contained three counts: two upon promissory notes, and one, a general money count, without any specification of the claim to be proven under it. This was fatal to the attachment.

R. S., chap. 344, 1838. *Phillips v. Pearson*, 55 Maine, 570; *Shaw v. Nickerson*, 60 Maine, 249; *Saco v. Hopkinton* 29 Maine, 268; *Drew v. Alfred Bank*, 55 Maine, 451.

In this last case, DANFORTH, J., says: "It is well settled that an attachment on such writ is void."

Benjamin Soule, therefore, had a perfect legal right to convey to the Heaths, and the title accordingly was, at the time of the levy, in the Heaths. *Saco v. Hopkinton*, *supra*; *Lumbert v. Hill*, 41 Maine, 483; *Rollins v. Mooers*, 25 Maine, 199; *Egery v. Johnson*, 70 Maine, 261.

If the attachment was void, the Heaths and Jerome Abbee had a prior and valid title to lot 56, at the time of the supposed levy, and the plaintiff had neither title nor possession of said lot 56, at the time of the alleged trespass. *Grant v. Ward*, 64 Maine, 240; *Johnson v. Leonards*, 68 Maine, 239.

Undoubtedly, the levy, had it been regular, would have operated as a disseizin of Soule, the judgment debtor's title, whatever it might have been; but it could in no possible way have operated to disseize the title of the Heaths and of Jerome Abbee; at all events, not without an actual entry for the purpose. *Bott v. Bernell*, 9 Mass. 96; *Gore v. Brazier*, 3 Mass. 539; *Larcom v. Cheever*, 16 Pick. 262; 11 Mass. 163.

The plaintiff certainly gained no title by the levy, and none by disseizin. *Nichols v. Todd*, 2 Gray, 568; *Slater et al. v. Jepherson*, 6 Cush. 131-2.

The Heath title was not impeached at the trial. In *Grant v. Ward*, 64 Maine, 240, Mr. Justice WALTON:—"Fraud is never presumed. In the absence of proof to the contrary, the presumption is that it does not exist." A little further on he says: "If effect be given to this deed, it of course defeats the plaintiff's title. No evidence is offered to impeach it, and no reason is assigned why it should not be held to be a valid deed. It may have been made to defraud creditors; but there is no evidence of any such fraudulent purpose." *Johnson v. Leonards*, *supra*. *Glidden v. Philbrick*, 56 Maine, 226.

The case of *Lowell v. Daniels*, 2 Gray, 161, is directly in point. Suppose the return of the levy had been signed by the

officer who made it, and had been duly recorded, and suppose the attachment in March, 1855, was a valid attachment, instead of being void; then the plaintiff would have had title at the time of the alleged trespass to two-thirds of lot 56; but the defendants would also have had title, at the time of the alleged trespass, to the Jerome Abbee one-third part of said lot 56. Therefore this action of trespass *quare clausum* cannot be sustained. 1 Chitty Pl. 180; 1 Wash. R. P. 568; *Kenniston v. Leighton*, 43 N. H., 312; *Ordione v. Lyford* 9 N. H. 513; 33 Verm. 192.

This last case is thoroughly considered and able, and *Silloway v. Brown*, 12 Allen, 37, is a case wherein the facts distinguish it from the Vermont and New Hampshire cases. But see *Hastings v. Hastings*, 110 Mass. 285, a case directly in point and fully sustaining this position; also 4 Kent, 407, 11 ed.; 4 Pick. 127; 2 *Ibid.* 444; 1 Addison, Torts, 423—notes.

HASKELL, J. Trespass *q. c.* for cutting timber upon lot 56, in Williamsburg, Piscataquis county, and carrying the same away. Some cutting and asportation are admitted. The case comes up on report, with an agreement that the title to the locus shall be determined.

The evidence fails to prove that the plaintiff has acquired title to the locus by disseizin; and his supposed title must be upheld, if at all, by virtue of an attachment and levy upon the locus, as the property of one Soule, who, at the date of the attachment in 1855, was the owner of two-thirds thereof, and at the date of the levy, had conveyed that interest to the defendant's predecessor in title.

The record produced shows that the judgment, supposed to have been satisfied by the levy, was rendered upon a declaration containing three counts, two upon promissory notes, and the third, for \$200 before the date of the writ "had and received by the defendant, to the plaintiff's use," without more particular allegation, or specification; the judgment was on default, and for the amount due upon the two notes declared upon.

No attachment of real estate creates any lien thereon, unless

the nature and amount of the plaintiff's demand are set forth in proper counts, or a specification thereof is annexed to the writ. R. S., c. 81, § 59. This statute enacted in 1838, c. 344, was in force when the supposed attachment was made.

The first two counts shown by the record are without fault; but the third count, for "money had and received," does not allege when the money was received, other than prior to the date of the plaintiff's writ; nor does it state from whom the money was received; nor on what account.

A count for money "had and received" may be drawn with sufficient precision, so as to be a specification in itself; but, when drawn without any particularity of circumstance, and not accompanied by a specification of claim, it is not sufficient to support an attachment of real estate. *Drew v. Alfred Bank*, 55 Maine, 451; *Phillips v. Pearson*, 55 Maine, 570; *Shaw v. Nickerson*, 60 Maine, 249; *Bank v. Lumber Co.* 73 Maine, 404; *Bartlett v. Ware*, 74 Maine, 292.

The levy upon the locus was made after the judgment debtor had conveyed his two-thirds interest therein to a stranger, through whom, the defendants claim title. By mistake, the officer making the extent did not sign his return, and asked the court below for leave to amend his return by signing it. It is agreed that the court may determine whether the amendment shall be made, and if allowed, it is to be considered as made. The truth of the return is not questioned, and no good reason is shown, why the amendment should not be allowed. The authorities permit it. *Fairfield v. Paine*, 23 Maine, 498; *Wilton Mfg. Co. v. Butler*, 34 Maine, 431; *Glidden v. Philbrick*, 56 Maine, 222; *Howard v. Turner*, 6 Maine, 106; *Gilman v. Stetson*, 16 Maine, 124; *Wilson v. Bucknam*, 71 Maine, 545; *Childs v. Barrows*, 9 Met. 413; *Pratt v. Wheeler*, 6 Gray, 520; *Peaks v. Gifford*, 78 Maine, 362.

Such amendment ought not to be allowed to the prejudice of innocent purchasers, and ordinarily, should only be allowed by saving the rights of such persons. *Glidden v. Philbrick*, *supra*; but in this case, such reservation is not called for, inasmuch as all interests in the locus adverse to the plaintiff have been

conveyed to Mr. C. A. Everett, a counsellor and attorney of this court, who was the attorney for the judgment creditor in making the writ, directing the attachment, procuring the judgment, making the extent, and in receiving seizin and possession of the locus for the judgment creditor, and in his name and stead.

The office of attorney and counsellor is full of responsibility and honor. The law holds out these officers to be competent, honest, and faithful to those seeking their counsel and assistance. The communications of the client must remain with the faithful attorney a secret forever; he can neither voluntarily disclose them, nor can he be compelled to do so by process of law. The law requires from these officers the most implicit fidelity and complete good faith in all their professional "walk and conversation." From them, judges of the court of last resort are to be selected, "persons learned in the law and of sobriety of manners." Their oath requires the strictest professional demeanor, absolute honesty, fidelity and good faith, both to the courts and to their clients.

Mr. Everett is a counsellor of this court of many years standing. More than thirty years ago, he was employed as an attorney at law by the judgment creditor to complete a statute conveyance of the locus to him. This, the attorney attempted to do, and forever must be cut off from denying, for his own pecuniary advantage, the validity of his work. He extended the execution upon the whole of lot 56, the locus. After the lapse of more than twenty years, by the outlay of less than twelve dollars, he procured releases to himself from sundry persons holding the record title to the locus. These conveyances, in contemplation of law, he took for the benefit of his client, the judgment creditor; and the title, so procured, enures to the latter, and this the attorney is estopped to deny. It may be, that in equity, the title so procured stands charged with the expense of gaining it; but it could never be invoked by the attorney to destroy the title of his client, the judgment creditor. That, he is bound to ratify and uphold; he cannot gainsay, or dispute it. The levy was intended to operate as satisfaction of

the judgment, and for that purpose, the attorney caused it to be made. In that capacity, he became invested for his client of seizin and possession of the locus. That seizin is sufficient to give the judgment creditor an action of trespass against one, who is estopped to deny it. *Reed v. Stanley*, 6 Watts & S. 376; *Galbraith v. Elder*, 8 Watts, 81; *Henry v. Raiman*, 25 Pa. St. 354, (S. C.) 64 Am. Dec. 703; *Smith v. Brotherline*, 62 Pa. St. 469.

Nor can the grantees of Mr. Everett invoke a purged title. The registry of deeds disclosed the levy, showing the receipt for seizin and possession of the locus signed by Mr. Everett as attorney for the judgment creditor; and the record of the judgment recites, that he appeared as attorney for the judgment creditor. These facts, shown by record, were notice to the defendants of the estoppel that attached to their grantor, in the absence even, of the other facts shown in evidence, tending to prove it. The purchase by Everett enured to the judgment creditor, precisely as though Everett had previously given him a deed of warranty of the premises, and the fiduciary relation, shown by the record, had the same force and effect as the record of such deed of warranty would have, that is, notice that works an estoppel upon the subsequent grantees of such grantor. *Pike v. Galvin*, 29 Maine, 183; *Crocker v. Pierce*, 31 Maine, 177.

Amendment of levy allowed. Defendant defaulted. Damages to be assessed below.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

JOHN W. HIGGINS, in equity, *vs.* HELEN E. BUTLER.

Waldo. Opinion December 27, 1886.

Evidence. R. S., c. 82, § 98. Contract unreasonable. Equity.

Where the defendant in a suit in equity is made a party as heir of the plaintiff's deceased wife, the plaintiff is thereby rendered incompetent as a witness by the provisions of R. S., c. 82, § 98.

Equity will not decree specific performance of an agreement when the evidence is conflicting and the agreement itself is unreasonable.

ON REPORT.

Bill in equity, reported by the justice presiding, upon bill, answer and proof, the parties agreeing thereto.

Thompson and Dunton, for the plaintiff.

Prior to the enactment of chapter 175, public laws of 1874, courts of equity had jurisdiction limited to the cases enumerated in chapter 77, R. S., but by chapter 175, P. L. 1874, which was incorporated into section 6, chap. 77, R. S., 1883, the court is empowered with "full equity jurisdiction, according to the usages and practice of courts of equity, and all other cases where there is not a plain, adequate and complete remedy at law."

In *Woodbury v. Gardner*, 77 Maine, 68, the court, in construing this statute, say, "until the St. 1874, c. 175, took effect, this court, on account of limited equity jurisdiction, could not decree specific performance of unwritten agreements for the conveyance of land under any circumstances. But now that this broad, general power is conferred, jurisdiction extends to the enforcement of all oral agreements when the parties have not a 'plain, adequate and complete remedy at law,' and the circumstances are such as to bring them within the established rules of equity governing such matters." See *Potter v. Jacobs*, 111 Mass. 32, 37; *Ash v. Hare*, 73 Maine, 403.

The complainant is a competent witness in this case. By the common law, parties could not testify, but that restriction was removed by R. S., c. 82, § 93, except in certain specified cases. Section 98 of R. S., c. 82, is as follows:

"The five preceding sections (meaning sections 93, 94, 95, 96 and 97) do not apply to cases, when at the time of taking testimony, or at the time of trial, the party prosecuting or the party defending, or any one of them, is an executor or an administrator, or is made a party as heir of a deceased party, except in the following cases:" and then follows five exceptions, which do not apply to this case.

In *Nash v. Reed*, 46 Maine, 168, where the question of the competency of witnesses arose, under circumstances similar

to the case at bar, the court say : "The question then legitimately before us is, whether the witnesses, who were offered and excluded, were made a party as heirs of a deceased party." . .

In *Wentworth v. Wentworth*, 71 Maine, 74, which was an action by a widow to recover her dower against a tenant claiming to hold as heir of defendant's deceased husband, objection was made to competency of demandant's testimony, and the court say : "The statutory inhibition applies only in cases where the heir is made a party because he is an heir, and where the ancestor would have been a party were he alive."

The case of *Burleigh v. White*, 64 Maine, 23, relied on by the respondent at the hearing in this case, is not applicable.

If one purchases an estate with his own money and the deed be taken in the name of another, a trust results by presumption of law in favor of him paying the money. *Baker v. Vining*, 30 Maine, 121; *Buck v. Swasey*, 35 Maine, 41; *Dwinel v. Veazie*, 36 Maine, 509.

Trusts concerning lands, arising by implication of law, need not be declared by any writing. *Dudley v. Bachelder*, 53 Maine, 403.

Payment of the purchase money may be proven by parol. *Richardson v. Woodbury*, 43 Maine, 206; *Kelley v. Hill*, 50 Maine, 470; *Burleigh v. White*, 64 Maine, 23.

And this may be shown after the death of the trustee as well as before. Hill on Trustees, (4 Am. ed.) 154.

The same question arose in *Burleigh v. White*, 64 Maine, 23, and the court say, "A fraudulent design is not to be presumed; it must be proved."

J. H. Montgomery, for the defendant, cited : Plaintiff not competent as a witness. R. S., c. 82, § 98; *Simmons v. Moulton*, 27 Maine, 496; *Wentworth v. Wentworth*, 71 Maine, 75; *Hubbard v. Johnson*, 77 Maine, 142. No resulting trust. R. S., c. 73, § 11; *Bates v. Hurd*, 65 Maine, 181; *Whitten v. Whitten*, 3 Cush. 200; *Spring v. Hight*, 22 Maine, 408; *Stevens v. Stevens*, 70 Maine, 92; *Gerry v. Stimson*, 60 Maine, 188; *Flint v. Sheldon*, 13 Mass. 448; *Cairns v. Colburn*, 104 Mass. 274. Specific performance can not be

decreed. *Woodbury v. Gardner*, 77 Maine, 71; *Hogan v. Wixted*, 138 Mass. 270; Story's Eq. Jur. § 130; *Glass v. Hulbert*, 102 Mass. 28; *Ash v. Hare*, 73 Maine, 403.

HASKELL, J. The orator seeks a decree, that the respondent shall convey certain real estate to him, upon two grounds.

I. That he may secure the benefit of a resulting trust that arose in his favor in the hands of his wife in her life-time, and at her death descended to the respondent.

II. That he may have specific performance of the respondent's agreement with him to make the conveyance.

The respondent by answer denies both the trust and the agreement, thereby casting the burden upon the orator to prove both.

Without the testimony of the orator, the evidence does not sustain the averment of the bill that the estate was held in trust; and to prove that issue the orator is not a competent witness. The respondent is summoned to answer the charge, that as heir of her mother the estate cast upon her is a trust estate, that was acquired and held by the mother in trust for the orator's use. She is thus "made a party as heir of a deceased party." R. S., c. 82, § 98; *Simmons v. Moulton*, 27 Maine, 496; *Burleigh v. White*, 64 Maine, 23; *Wentworth v. Wentworth*, 71 Maine, 72.

To prove the alleged agreement of the respondent to convey, the orator is a competent witness; because, touching that agreement the respondent is summoned to answer in her own right, and on her own account. It seems that the bill must be multifarious, as two distinct causes for relief are set out, but as no objection is urged on that account the court is constrained to decide the latter issue.

The property said to have been conveyed to the mother, and inherited by the respondent, and by her agreed to be conveyed to the orator, is valued by some witnesses at twelve hundred dollars. The consideration, that is said to have been paid by the orator for the respondent's agreement to convey, was the delivery of a horse valued by some witnesses at one hundred

dollars. Whatever agreement the respondent made, was doubtless under the impression, that she could not hold the land, but had only a claim against it for money, that she had expended in the support of her father's family, amounting to a considerable sum.

The evidence touching the agreement is so conflicting and unsatisfactory, and the agreement, standing by itself, as it must stand in this cause, is so unreasonable, that the court hesitates relief, and refers the parties to a court of law, where such damages may be recovered as the law may give. *Woodbury v. Gardiner*, 77 Maine, 71.

Bill dismissed.

PETERS, C. J., WALTON, DANFORTH, EMERY and FOSTER, JJ., concurred.

78	524
91	535

JOHN BIRD and another, in equity *vs.* H. H. CLEVELAND, assignee.

Knox. Opinion December 28, 1886.

Insolvent law. Assignee. Dividend. Equity.

The Supreme Judicial Court, as a court of equity, has supervisory rather than concurrent jurisdiction with the insolvent court; and it will not order an assignee to declare and pay a dividend until application has first been made to the insolvent court.

ON report by the presiding judge, with the consent of the parties, upon bill and demurrer.

C. E. Littlefield, for the plaintiffs.

Section 32 of the insolvent act provides that the assignee shall give a bond, but no remedy is provided for the creditors on the bond.

Section 39 of the act, provides that the register shall give not less than five days notice of all dividends about to be declared to all creditors, named in the schedule of debts. No such notice has been given.

But inasmuch as this notice is a prerequisite to a dividend until given, the assignee cannot pay and is not liable for the dividend, and as, until then, it cannot be determined how many

claims will be proved within the five days, and it is, therefore impossible to determine the amount recoverable by the plaintiff, it is obvious that no action would lie to recover what was not payable or an amount which could not be definitely and legally determined.

In defining the powers of the court under this section, the court in 71 Maine, 155, said: "This clause refers to cases involving the rights of the assignee, debtor and creditors, as between themselves in the management and distribution of the assets." This seems to cover the case at bar.

J. H. Montgomery, for the defendant.

FOSTER, J. The plaintiffs are creditors of John H. Parker, who, on the 15th day of June, 1883, was duly adjudged an insolvent debtor, and upon whose estate the defendant was appointed assignee.

This bill is filed under R. S., c. 70, § 11, by which it is enacted that "the Supreme Judicial Court has full equity jurisdiction in all insolvent matters," and alleges that the plaintiffs, as creditors of said Parker, have duly proved their claim of \$308.08; that the defendant has settled his account in the insolvent court, and there remains in his hands, after paying all expenses, charges and preferred claims, the sum of \$333.51 for distribution among the creditors of said estate who had proved or might prove their claims before dividend made. It also avers that "a large number of creditors have proved their claims against said estate;" that no dividend has ever been declared or paid to said creditors by the defendant, or notice given by the register to any of the creditors, and that the defendant refuses to declare or pay any such dividend or to procure the register to give the notice required by law, or to disburse the sum in his hands to the creditors of the estate. The prayer is, that the defendant be ordered to require the register to notify the creditors of an intended dividend, and thereafter that the defendant pay a dividend to all the creditors who shall then have proved their claims.

To this bill the defendant demurs, and the case is before the court on the bill and demurrer.

Taking the allegations in the bill to be true, as we are bound to do upon demurrer, it sets forth no case falling within the equity jurisdiction of this court relating to insolvency proceedings. While the language of the statute is broad and comprehensive in regard to the equity powers of this court, in such proceedings, yet it is not without limitation in its application. Its jurisdiction is supervisory rather than concurrent. In our own State, the statute in question has been before the court and received an interpretation which is in harmony with that expressed by the decisions of the court in Massachusetts, where a somewhat similar provision has existed for many years, and frequently been the subject of judicial decision. And it appears to be settled that it was the evident intention of the legislature to confer upon this court, sitting as a court of equity, full supervisory jurisdiction to revise the proceedings, orders and decrees of the insolvent court, in cases where no other remedy is given by statute. *Harris v. Peabody*, 73 Maine, 266; *Lancaster v. Choate*, 5 Allen, 538; *Barnard v. Eaton*, 2 Cush. 301, 302; *Harlow v. Tufts*, 4 Cush. 452; *Winchester v. Thayer*, 129 Mass. 133.

In the case of *Harlow v. Tufts*, *supra*, the court say: "It may be proper, however, to remark, that, although the power thus conferred on the court, is general, they will consider, in the exercise of it, the purpose for which it was given, namely, to reach cases not otherwise provided for; and they will probably therefore, be slow to exercise it, until other remedies, to be obtained in the ordinary course of proceeding, have been exhausted."

By § 39 of the insolvent law, it is made the duty of the assignee, whenever he receives from the estate, assets available to pay a dividend equal to twenty-five per cent of the debts proved, exclusive of expenses, to declare and pay such dividend and render an account thereof to the judge; and for each twenty-five per cent of assets received, to make a like dividend; and a final dividend at such time as the judge directs. But no

dividend is to be paid or declared, without the approval of the court, entered of record.

The allegations of the plaintiff's bill may all be true, and the defendant not in fault. The assignee is not, by law, obliged to declare a dividend unless it be a final one, or such as the court may order, until the amount collected by him amounts to twenty-five per cent of the debts proved, exclusive of expenses. While the bill specifically states the amount of the plaintiff's debt proved it also sets forth that "a large number of creditors have proved their claims against said estate." What the amount of the debts proved is, does not appear; nor is it alleged that the amount in the hands of the assignee, exceeds twenty-five per cent of the debts proved against the estate.

Furthermore, the declaring or paying a dividend is not at the motion of the assignee only. He is not authorized to declare or pay any dividend without the approval of the insolvent court obtained and entered of record—nor a final one till such time as the judge of the court of insolvency directs. The main question raised is *when* a dividend shall be made,—not what it shall be, or to whom,—a question over which the insolvent court would seem to possess primary jurisdiction. If the assignee has delayed to declare a dividend beyond what parties interested deem a reasonable time, application to the judge of the insolvent court, to whom the assignee has given bond for the faithful discharge of his duties, and who may remove him at any time for good cause shown (§31,) might afford ample remedy, and would appear to be the appropriate course to pursue in the first instance. Such were the views of the court in *Lincoln v. Bassett*, 9 Gray, 357; which was a bill in equity against an assignee of an insolvent estate, who had received in cash from the estate a sum exceeding five thousand dollars, but had never rendered any account, nor declared or paid any dividend, notwithstanding the requirement of the statute that within eighteen months from the time of the assignee's appointment, his account should be produced and settled and a dividend made. In that case BIGELOW, J., said: "So far as the bill goes on the ground of a neglect by the assignee to render his accounts in

due season, and to make a dividend according to law among the creditors of the insolvent, it is open to the objection that the proper remedy in such case is to apply in the first instance to the court having original jurisdiction of the insolvent proceedings." *Glenny v. Langdon*, 98 U. S. 28-9-30.

In the case at bar, it does not appear that any application has ever been made to the judge of the insolvent court, or that the remedy to be obtained in the ordinary course of proceeding has been exhausted, or even invoked. There is no reason shown by the allegations in the bill, that the assignee might not properly refuse to declare a dividend on the individual application to him of the plaintiff. Nor is there any claim that the judge has been derelict in his duty,—or refuses to exercise that discretion with which he is invested by the provisions of the statute as to the time in which he may direct the defendant to declare a final dividend.

While this court, in the exercise of its supervisory jurisdiction in equity over the proceedings, orders and decrees of the insolvent court, will, in proper cases, make such orders and give such directions as the law and the rights of the parties may require, yet, as was said by the court in *Lancaster v. Choate*, *supra*, "it is a power to be exercised with great caution; not in cases where there has been *laches* in the court of insolvency, but only where the party complaining can show that he has been aggrieved and has pursued his remedy diligently."

Bill dismissed with costs.

PETERS, C. J., DANFORTH, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

ROBERT CARTER and wife *vs.* JOHN HARDEN.

Hancock. Opinion December 31, 1886.

False representations. Husband and wife.

Where a wife is injured by a vicious horse, which was sold to her husband as a kind animal and good family horse, she has no remedy for her injury against the seller, because of his false representations to the husband, when it does not appear that the seller understood that the horse was being

purchased for the wife, or for her use, or that he expected the wife to rely upon any representations of his to her husband.

ON REPORT.

An action of the case by husband and wife for damages for personal injuries received by the wife. The facts as found by the court are sufficiently stated in the opinion.

B. P. Soule, for the plaintiffs.

The principle applicable to this point is the same as decided in *Langridge v. Levy*, 2 M. & W. 519 Ex. Rep. or more commonly known as the gun case.

In *Langridge v. Levy*, the contract was made with the father of the plaintiff, on behalf of himself and his family. There was nothing to show that the defendant was aware even of the existence of the particular son injured.

In an American case, *Thomas v. Winchester*, 6 N. Y. 397, the case is carried further.

In support of the privity of parties, the plaintiff also cites Addison on Torts, vol. 1, p. 49; also vol. 2, pp. 398, 404, 451, and all the cases there cited.

In *Chapman v. Pickersgill*, 2 Wils. 145, WILMOT, C. J., says: "This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." If she can not sue, there is a wrong without a remedy.

George P. Dutton, for the defendant.

EMERY, J. The female plaintiff was riding with her husband in his wagon, drawn by his horse, which he was driving. The horse became unmanageable and ran away, throwing the female plaintiff from the wagon to her injury. In the absence of any contractual rights or obligations, she would have a right of action against that person only, whose tort was the direct proximate cause of the injury. In seeking for this cause, she goes back to the purchase of the horse by her husband from the

defendant. This purchase was made eighteen days before the injury, and at a place over twenty-five miles distant. She claims that the defendant, knowing the horse to be an unmanageable runaway, and knowing that her husband had a wife and family, yet to induce her husband to buy the horse, falsely represented it to be a safe and kind horse, and good family horse.

She does not claim there was any privity between her and the defendant in this contract. She does not claim that she thereby acquired any contractual rights against the defendant. All such rights belong to the husband. She does claim, however, that a wrong was done her by the defendant, that his deceit of her husband was a tort against her, and was the direct, proximate cause of her injury.

In support of this proposition, her counsel cites and mainly relies upon *Langridge v. Levy*, 2 M. & W. 519, where a son injured by the explosion of a gun sold to the father by the defendant, recovered for his injuries against the defendant. In that case, however, it was alleged and appeared that the father purchased the gun to be used by himself and his son, that the defendant knew the gun was being so purchased, and that it was to be used by the plaintiff, the son, and that he made the false representations expecting the son as well as the father to rely upon them. The action was sustained solely upon that ground, on the ground that the defendant expected the son to act upon his statements, and therefore contemplated any harm that might come to him therefrom. In the case at bar, we do not find from the evidence, that the defendant understood that the horse was being purchased for the wife, or for her use, or that he expected the wife to rely upon any representations of his. The husband was in the business of peddling sewing machines, and the defendant understood the horse was wanted for use in that business.

Baron PARKE, who pronounced the judgment in *Langridge v. Levy*, afterward in *Longmeid v. Holliday*, 6 Exch. 766, said that the principle of the former case was that if any one knowingly tells a falsehood, with intent to induce another to do an act which results in loss, he is liable to that person in an action

of deceit. To bring this case at bar within that principle, it should appear that the defendant made the false representations with the intent to induce the wife to act upon them. The evidence fails to show any representations made with that intent.

This case is more similar to *Winterbottom v. Wright*, 10 M. & W. 109, than to *Langridge v. Levy*. In *Winterbottom v. Wright*, the defendant had contracted with the Post Master General to provide for a certain post route, mail coaches of suitable strength, etc. A third party contracted to horse the coaches along the same route, and employed the plaintiff as one of his drivers. The plaintiff was injured by some defect in the coach, the fault of the defendant. It was held that plaintiff could not recover against the defendant. The case of *Langridge v. Levy*, was expressly distinguished. ALDERSON, B., said: "The principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it." Lord ABINGER, C. B., in the same case said: "We ought not to attempt to extend the principle of that decision, which, although it has been cited in support of this action, wholly fails as an authority in its favor, for there the gun was bought for the use of the son, who could not make the bargain himself, but was really and substantially the party contracting." In *Blakemore v. Bristol & Exeter Ry Co.* 8 El. & B. 1035, COLERIDGE, J., said: "It has always been considered that *Langridge v. Levy* was a case not to be extended in its application."

In the case *Thomas v. Winchester*, 6 N. Y. 397, cited by plaintiff, the act of the defendant was shown to be the direct proximate cause of the injury to the plaintiff. The act of the defendant was the carelessly labelling a deadly poison as a harmless medicine, and putting it on the market as such. Such an act was a tort directly against any person, who should, on the strength of the label, purchase and use the compound as a medicine. The plaintiff did rely upon the label, and used the compound to his injury. It was like the case of the squib thrown into the market place. The thrower was liable to whatever

person was finally struck and hurt by it. Chief Justice RUGGLES, in the opinion, expressly distinguishes the case from *Winterbottom v. Wright*, which he cites with approval.

In the case at bar, the alleged cause is evidently too remote, in time, place and sequence, to be the direct, proximate cause of the plaintiff's injury, and she has not shown that the defendant told any falsehood with the intent that she should act upon it.

Plaintiff's nonsuit.

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

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A. V. COLE and others, appellants from the decree of the
COUNTY COMMISSIONERS.

Cumberland. Opinion December 31, 1886.

*Ferry landing in Portland. People's ferry. Special Stat. 1873, c. 375.
Special Stat. 1885, c. 495. Constitutional law. Appeal.*

The act of 1873, c. 375, which provides in section 1, "That the county commissioners of the county of Cumberland, on petition of one hundred or more citizens of said county, be and hereby are authorized and empowered to locate a public highway in the city of Portland, extending into tide waters of sufficient depth, with a good and substantial ferry way, . . . with the right to take private property therefor, in like manner and effect as in locating other highways in said county," is constitutional.

The authority of the commissioners under that act, is not confined and limited to one petition, when the action thereon was adverse.

The doctrine of *res judicata* does not apply to the action and judgment of county commissioners in locating highways.

An appeal lies to the action of the county commissioners, under the act of 1873, c. 375.

When such an appeal has been taken from the adverse decision of the commissioners upon a petition asking them to lay out a highway from Commercial street "down said Portland pier to the end of said pier and into tide waters a sufficient distance to give a sufficient depth of water," the committee, appointed by the appellate court, do not exceed the powers conferred upon them by law, when they report that the judgment of the commissioners should be wholly reversed, and "that common convenience and necessity do require the location of said highway and ferry landing on Portland pier, in the city of Portland, as prayed for in said petition."

ON EXCEPTIONS.

The opinion states the case. The following is an abstract from the petition to the commissioners :

"The undersigned, being more than one hundred citizens of said county of Cumberland, hereby respectfully represent to your Honors that in their judgment, the public convenience and necessity require the location of a public highway in the city of Portland, commencing at a point in the centre line of Commercial street, near where a line about four feet westerly from the easterly side of a private passage way at the head of Portland Pier crosses said line of Commercial street, thence south easterly down said Portland pier to the end of said pier and into tide waters in said city, a sufficient distance to give a sufficient depth of water and to provide a good and substantial ferry-way and landing therein, suitable for the passage and accommodation of teams and passengers, as provided in chapter 375 of the special laws of the year 1873, and in chapter 495 of the special laws of the year 1885."

Nathan and Henry B. Cleaves, Drummond and Drummond, and F. H. Harford, for the appellants, cited: *Palmer v. Dayton*, 4 Cush. 270; *Eddy's Case*, 6 Cush. 28; *City of Belfast, appellants*, 53 Maine, 431; *B. & M. R. R. Co. v. Co. Com'rs*, 78 Maine 169; *Friend v. Co. Com'rs*, 56 Maine, 262; *French v. Co. Com'rs*, 64 Maine, 583; *Windham, Pet'r*, 32 Maine, 452; *Belfast v. Co. Com'rs*, 67 Maine, 530; *Powers, v. Mitchell* 75 Maine, 364; *Acton v. Co. Com'rs*, 77 Maine, 128; *Hayford v. Co. Com'rs*, 78 Maine, 153; *Howland v. Co. Com'rs*, 49 Maine, 146; *True v. Freeman*, 64 Maine, 573; *Clark v. Middlebury*, 47 Conn. 331; *Kennett's Pet.* 24 N. H. 139; *Day v. Stetson*, 8 Maine, 368; *Com. v. B. & L. R. R. Co.* 12 Cush. 254; *Small v. Pennell*, 31 Maine, 267; *Bethel v. Co. Com'rs*, 42 Maine, 478; *Jordan, Pet'rs*, 32 Maine, 473; *Pet. Strafford*, 14 N. H. 30; *Howard, Pet.* 28 N. H. 157.

The act was constitutional: *Com. v. West Boston Bridge*, 13 Pick. 195; *Middletown*, 82 N. Y. 196; *Gordon v. Cornes*, 47 N. Y. 617; *Fowler v. Bull*, 46 N. Y. 69; *Packet Co. v. Keokuk*, 95 U. S. 80; *Allen v. Louisiana*, 103 U. S. 80; *Fisher v. McGirr*, 1 Gray, 1; *Rochester v. Briggs*, 5 N. Y.

566; *Cooly on Const. Lim.* 178; *Warren v. Charlestown*, 2 Gray, 98; *Com. v. Clapp*, 5 Gray, 100; *Com. v. Hitchings*, 5 Gray, 485; *Packard v. Lewiston*, 55 Maine, 458; *Schwartz v. Drinkwater*, 70 Maine, 409.

The committee did not exceed its powers: *Harriman v. Co. Com'rs*, 53 Maine, 83; *Smith v. Co. Com'rs*, 42 Maine, 395; *Coombs v. Co. Com'rs*, 68 Maine, 484; *Mills on Eminent Domain*, §§ 274, 275; *Hunter v. Newport*, 5 R. I. 325; *Bristol v. Branford*, 42 Conn. 321; 9 Gray, 58; 3 Mass. 406; 4 Gray, 414.

C. W. Goddard, for remonstrants from ten towns.

Joseph W. Symonds, for the city of Portland.

George E. Bird, for Proprietors of Portland Pier.

A. A. Strout, for the Portland and Cape Elizabeth Steam Ferry Company.

The several remonstrants unite in resisting the acceptance of the report of the committee, and in their prayer that their exceptions may be sustained by this honorable court, mainly for the reasons set forth in this brief.

I. Because the enabling act of 1873, on which these appellant petitioners rely, was not a public, general, or permanent law of the state, of inexhaustible vitality and perpetual force; but a private and special enactment, limited in its scope and designed for a particular, specified purpose. And that its vitality was exhausted during the year of its enactment, by the final adjudication of the county commissioners of Cumberland county, without appeal, in 1873, on the petition of David Keazer and others, who availed themselves of the act and encountered an adverse final adjudication thereon by the appropriate tribunal. And that the act of 1873 has not been revived or resuscitated by the private and special act of 1885, "to incorporate the People's Ferry Company."

II. Because the act of 1873, authorizing and empowering the commissioners of Cumberland county to construct and maintain a public highway into tide waters in the city of Portland, confers no right of appeal from the decision and judgment of said

commissioners ; and therefore the judgment and decision of said commissioners refusing to locate and construct the public highway and ferry landing prayed for by the petitioners is final and not subject to appeal.

III. Because the act of 1873 is unconstitutional and void for the reason that while it purports to confer upon the commissioners the right of eminent domain for the avowed purpose of a highway and landing, it nevertheless authorizes the city of Portland to use or lease portions of the same for other purposes than those of a public highway and ferry landing ; so that under the terms of said act, private property may be taken ostensibly for public use, to wit, for a public highway and ferry landing, and yet portions of said property may in fact be used solely and exclusively for the private uses and purposes of individuals.

IV. Because the committee have exceeded the authority conferred on them by law and by their commission, by requiring the county commissioners to locate and construct a public highway and ferry landing down Portland Pier to the end thereof, without regard to the depth or sufficiency of water, thereby in their report encroaching upon the jurisdiction of said commissioners conferred by the act of 1873, which authorizes and empowers said commissioners to extend said highway into tide waters of sufficient depth and no farther, and confers on said commissioners the exclusive authority to determine and judicially adjudge how far into tide waters said highway shall be extended.

LIBBEY, J. The proceedings in this case were had by virtue of the act of 1873, c. 375, as modified by act of 1885, c. 495.

The act of 1873 reads as follows : "Sect. 1. That the county commissioners of the county of Cumberland, on petition of one hundred or more citizens of said county, be and hereby are authorized and empowered to locate a public highway in the city of Portland, extending into tide waters of sufficient depth, with a good and substantial ferry-way and landing therein, suitable for the passage and accommodation of teams and foot passengers, with right to take private property therefor, in like manner and effect as in locating other highways in said county."

"Sect. 2. Said highway and landing shall be governed and controlled by the city of Portland, and so much of said highway and landing as is not required for said ferry purposes, may be used or leased by said city for any other purpose."

The act of 1885, § 8, provides "that the county commissioners of the county of Cumberland shall not be called upon to locate a public highway in tide waters in the city of Portland, under the act of 1873. . . . until a double end steam ferry-boat, suitable for the carriage of teams and passengers, is put upon said ferry route, and its continuous operation secured, to the satisfaction of said county commissioners."

At the June term of the court of county commissioners of the county of Cumberland, a petition in all respects in compliance with the acts aforesaid, was presented to said court, and upon due proceedings had by said commissioners, they heard the parties interested, and at the January term of said court, reported that all the requirements of the acts aforesaid had been complied with, but they adjudged and determined that public convenience and necessity did not require the location of the highway prayed for.

An appeal was duly taken to the January term of the Supreme Judicial Court in said county, when a motion was filed by the remonstrants to dismiss the appeal on the ground that the court had no jurisdiction. This motion was overruled and a committee was appointed. To this ruling exception was taken. At the April term of said court the committee made their report, in which they "adjudge and determine that common convenience and necessity do require the location of the aforesaid highway and ferry landing on Portland pier, in the city of Portland, as prayed for in said petition, and we do wholly reverse the judgment of said commissioners."

Several objections were filed by the remonstrants to the acceptance and confirmation of the report, but four only are relied upon, and need be considered.

I. It is claimed that, inasmuch as the act of 1873 was not a general statute, but special and local in its character, enacted for a special purpose, it conferred upon the county commissioners

power to act but once under it; and that their power was exhausted by their adverse action on the petition of David Keazer and als. in 1873.

We think this objection can not prevail. The petition of Keazer and als. did not describe the way to be located in any manner, and therefore gave the county commissioners no jurisdiction to act under the statute. R. S., c. 18, § 1. Their action upon that petition was void. But we are of opinion that the act of 1873 should receive a broader construction than that claimed for it by the learned counsel for the respondents. Before its passage, the county commissioners had no power to locate a public highway in the city of Portland; nor could they locate one into tide waters. The act of 1873 removed both of these limitations upon their jurisdiction, and in these respects enlarged it to be exercised "in like manner and effect as in locating other highways in said county." Under the general statute giving them the power to locate other highways in said county, the only limitation upon their jurisdiction is that if their decision is against the prayer of the petition, no new petition shall be entertained for one year thereafter. R. S., c. 18, § 45. The doctrine of *res adjudicata* does not apply to the action of county commissioners in the location of highways. The facts and situation may be such as to require them to refuse to locate on one petition, when such changes may take place in the wants and necessities of the public as to require the location a year or two thereafter.

II. It is contended that there is no appeal given by law from the judgment of the county commissioners under the act of 1873. This contention can not be sustained. The case of *City of Belfast*, appellants, 53 Maine, 431, is conclusive against the respondents. The proceedings for the location of the highway under said act, are in all respects the same as in the location of other highways.

III. The third ground of objection is that the act of 1873 is unconstitutional, inasmuch as it authorizes the taking of private property for private uses. This objection is based on the second section of the act, which provides that "so much of said highway

and landing as is not required for said ferry purposes, may be used or leased by said city for any other purpose." The fallacy of this position is that it assumes that the act authorizes the taking of private property for private uses. The power conferred upon the commissioners by the act is to locate a "public highway" in Portland and into tide waters, and to take private property *therefor*, "in like manner and effect as in locating other highways in said county." The highway is to be located only when it is adjudged to be of public convenience and necessity. They can take private property only for the "public highway," as in the location of other highways. They can not take it for the use of the city.

The right given to the city by the second section is *contingent* and may never be brought into life, and that section is entirely independent of the first section. Assuming that the legislature exceeded its constitutional power in enacting the second section, it may be rejected without in any way impairing or affecting the powers granted in the first.

It is a well settled rule of law that the same statute may be in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional may be rejected. *Allen v. Louisiana*, 103 U. S. 80; *Packet Co. v. Keokuk*, 95 U. S. 80; *Packard v. Lewiston*, 55 Maine, 456; *Schwartz v. Drinkwater*, 70 Maine, 409; *Fisher v. McGirr*, 1 Gray, 1.

In what we have said we do not mean to hold that the second section is in conflict with the constitution. If the contingency stated in the act occurs, and the city undertakes to exercise the license given by it, it will be in season to decide this question, if raised and properly brought before the court. *Packet Co. v. Keokuk*, 95 U. S. 89.

IV. The last objection is that the committee have exceeded the power conferred on them by law. We can see no ground for this objection. By R. S., c. 18, § 49, the committee is required, after viewing the route and hearing the parties, to report "whether the judgment of the commissioners should be in whole or in part affirmed or reversed." They reported that

the judgment of the commissioners should be wholly reversed, and "that common convenience and necessity do require the location of said highway and ferry landing on Portland pier in the city of Portland, as prayed for in said petition." The substance of this adjudication is that the whole highway should be located as prayed for. This is strictly within their legal authority. When the report is accepted and judgment entered thereon, and is certified to the court of commissioners, the case will stand precisely the same as if the commissioners had, themselves, made the same adjudication; and it will become their duty to carry the judgment of the appellate court into full effect, as if made by themselves. The water terminus of the highway is described in the petition, "the end of said pier and into tide waters to give a sufficient depth of water." It will be the duty of the commissioners in making the location, to fix the precise termini of the highway. In doing so, they are not required by the judgment of the appellate court, to adhere strictly to the bounds named in the petition; but they must conform substantially to them, so as to effectuate the purpose sought. R. S., c. 18, § 1.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

ALFRED COLE vs. WILLIAM C. HAYES.

Oxford. Opinion December 31, 1886.

78	539
91	577

Jurisdiction. Ad damnum. Trial justices. R. S., c. 83, § 3.

The Supreme Judicial Court has jurisdiction in an action of assumpsit, when the *ad damnum* is more than twenty dollars, though the cause of action set out in the declaration is a promissory note for twelve dollars.

The *ad damnum* in the writ is the "debt or damages demanded," within the meaning of R. S., c. 83, § 3, which gives trial justices exclusive jurisdiction "when the debt or damages demanded do not exceed twenty dollars."

ON EXCEPTIONS.

Assumpsit on a promissory note dated May 14, 1883, for the sum of twelve dollars, payable in six months, with interest annually. The writ was dated March 23, 1886. The plaintiff

resided in Oxford county, and the defendant in Piscataquis county.

The defendant filed a motion to dismiss, and the exceptions were to the ruling of the court in overruling that motion.

George D. Bisbee and *Oscar H. Hersey*, for the plaintiff, cited: *Merrill v. Curtis*, 57 Maine, 152; 61 Maine, 22; 6 Maine, 325; 8 Allen, 337; 3 Allen, 532; 14 Gray, 521; 8 Gray, 373; 12 Gray, 139; 2 Greenl. Ev. 260; 16 Mass. 74; 10 Mass. 251; 11 Maine, 149; 28 Maine, 207; 47 Maine, 460.

James S. Wright and *J. B. Peaks*, for defendant.

Trial justices have exclusive jurisdiction where the debt or damages are less than twenty dollars. R. S., c. 83, § 3.

In actions of tort the *ad damnum* might determine the question *prima facie*, as that would, or might be the only means of determining the amount of damages claimed, the damages being unliquidated, but in actions of assumpsit, on a contract, the declaration must determine the amount claimed, and that would be the amount of the debt or damage demanded.

In *Ridlon v. Emery*, 6 Greenl. 261, the court held that the common pleas court had jurisdiction where property was of less value than twenty dollars, because the statute did not give exclusive jurisdiction to justices of the peace, but only concurrent jurisdiction. In *Hapgood v. Doherty*, 8 Gray, 373, the court held that the one hundred dollar *ad damnum* was the debt or damage demanded, but it was a case where the account annexed was one hundred and twenty-three dollars.

In the cases in the Mass. Reports, where the court has held that the debt or damage demanded means the *ad damnum*, the decisions are based upon a different statute from ours.

LIRBEY, J. By R. S., c. 83, § 3, trial justices "have original and exclusive jurisdiction of all civil actions, . . . when the debt or damages demanded do not exceed twenty dollars," except certain cases therein specified.

In this case the note declared on is for twelve dollars and interest. The *ad damnum* is for more than twenty dollars. It

is claimed by the defendant that the "debt or damages demanded" is to be determined by computing the amount due on the note when the action was commenced, and not by the *ad damnum*. We think this is not the law. It appears to be well settled that in all actions sounding in damages as assumpsit and tort, the jurisdiction depends upon the *ad damnum*, which is the amount of damages demanded. *Estes v. White*, 61 Maine, 22; *Hapgood v. Doherty*, 8 Gray, 373; *Bank v. Pearson*, 14 Gray, 521.

In such case, it can not be judicially determined that the debt or damages which the plaintiff is entitled to recover, are less than the *ad damnum*, until judgment is rendered; and then, if it is for a sum less than twenty dollars, it does not affect the jurisdiction. *Ladd v. Kimball*, 12 Gray, 139.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, EMERY and HASKELL, JJ., concurred.

MARY P. P. SWETT vs. CITIZENS' MUTUAL RELIEF SOCIETY.

Cumberland. Opinion December 31, 1886.

Citizens' Mutual Relief Society. Life Insurance. Assessment. Misrepresentation. Waiver. Assignment.

The Citizens' Mutual Relief Society of Portland, is a mutual life insurance company.

Where an applicant for admission to a voluntary association for mutual relief, the rules of which did not admit members over sixty years of age, stated his age, in his application, to be fifty-nine years, when in fact he was sixty-four years of age,—it is such a misrepresentation as invalidates the contract of insurance issued thereon.

Nor is such contract made valid by the incorporation of the members of the voluntary association and the assumption by that corporation of the contracts of the voluntary association.

The treasurer of such a company can not ratify and make valid an invalid contract of insurance.

The acceptance of the payment of unpaid assessments by the treasurer, made by the claimant after the death of the assured, is not a waiver by the company of any invalidity in the original contract of assurance.

Assessments paid by the members of a mutual life insurance company into the treasury of the corporation, in accordance with its by-laws, become the money of the company.

78	541
89	165
78	541
91	256
78	541
1104	359
78	541
105	22

Members paying such assessments can not control the disposition of them, nor will an assignment of them by such members pass any title to the assignee.

ON REPORT.

M. P. Frank, for the plaintiff.

If, upon investigation and report, the applicant is admitted, that is the end of it in the absence of actual fraud or concealment which will never be presumed, and of which there is no evidence in this case. *Illinois Masons' Society v. Winthrop*, 4 LAW & Eq. Reporter, 554 (Supreme Court of Ill. Oct. 9, 1877).

The defendant corporation was not formed until May 17, 1877, having previously been simply a voluntary association. In its corporate capacity it is not a life insurance company. Public Laws of 1875, c. 373.

The plaintiff's husband was admitted to membership of the defendant corporation, without any application or representation whatever.

The money sued for has all been paid into the treasury of the defendant corporation. It was paid on account of the death of W. H. Swett, and for the use and benefit of, or to be paid to, one of the persons found upon investigation by the directors to exist, in this case the plaintiff. Who is entitled to it, if not the plaintiff? Nothing in the by-laws allows it to be used for any other purpose.

They had no right to make an assessment except upon the death of a beneficial member. If Mr. Swett was not such, then the assessment was wrong and unauthorized, and the society has no right to the money so paid in. It must be paid either to the plaintiff, upon the ground that her husband, on account of whose death it was assessed, was a beneficial member, or it must be returned to the persons from whom it was received, on the ground that he was not a beneficial member, and that the assessment was wrongfully made.

By receiving assessments and retaining them, they will be deemed in law to have waived any fact within their knowledge, which might have been set up to avoid their liability. *Excelsior Mut. Aid Association v. Riddle*, 16 Cent. Law Journal,

407 (Supreme Court of Indiana, May 11, 1883); *Erdman v. Mut. Ins. Co.* order of Herman's Sons, 6 Reporter, 606 (Supreme Court of Wisconsin, July, 1878); *Cotton States Life Ins. Co. v. Edwards, Adm'x*, 18 Reporter, 584 (Supreme Court of Georgia, Oct. 21, 1884); *Ins. Co. v. Norton*, 96 U. S. (6 Otto,) 234; Hermon on Estoppel, edition of 1871, pp. 518-19.

Byron D. Verrill, for the defendant, cited: *Bolton v. Bolton*, 73 Maine, 299; *Campbell v. N. E. Mut. Life Ins. Co.* 98 Mass. 381; *Kimball v. Aetna Ins. Co.* 9 Allen, 540; *Herrick v. Union Mut. F. Ins. Co.* 48 Maine, 558; *Battles v. York Co. Mut. Fire Ins. Co.* 41 Maine, 208; *Armour v. Transatlantic F. Ins. Co.* 90 N. Y. 450; *Aicher v. Metropolitan Life Ins. Co.* 13 Phil. 139; *Thompson v. Buchanan*, 4 Bro. P. C. 482; *Vose v. Eagle Life & Health Co.* 6 Cush. 42; May, Insurance, § 181; *Dennison v. Thomaston Mut. Ins. Co.* 20 Maine, 125; *Treadway v. Hamilton Mut. Ins. Co.* 29 Conn. 68; *Smith v. Haverhill Mut. Fire Ins. Co.* 1 Allen, 297.

LIBBEY, J. The defendant corporation is similar to the one involved in *Bolton v. Bolton*, 73 Maine, 299, in which this court, after a careful consideration of the question, held that such corporations are mutual life insurance companies.

In 1875, certain men formed a voluntary association, under the name of the Citizens' Mutual Relief Society, of Portland, having for its object the payment of a stipulated sum on the death of a member, as relief to any person designated by him in writing, or to his widow, children, or relatives, in the order specified in the articles of association.

The requisite qualifications for membership were as follows: "Any male resident of the city of Portland, and any business man resident in Cape Elizabeth, Deering, Westbrook, Scarborough, Gorham or Windham, having a regular and established place of business in Portland, if twenty-one and not over sixty years of age, may become a member upon a two-thirds vote of those members of the society present when the election is held, and payment of the admission fee, as follows."

An applicant for admission was required to make application in writing, stating among other things, his age.

On the 15th of June, 1876, the plaintiff's husband, William H. Swett, made his application to be admitted as a member, stating therein that he was born in 1817, and his age was fifty-nine years. On this application, by the requisite vote of the members of the society, he was admitted a member and acted as such, paying his dues till May, 1877, when the associates were incorporated by the same name and organized the defendant corporation. By a by-law of the corporation, the qualification for membership, as to age, was "twenty-one and not over fifty-five years of age." By a vote of the corporation, passed when it was organized, all members of the voluntary association were made associate members of the corporation without a new application.

Swett continued to pay his dues as a member of the society till his death, May 29, 1883. By the terms of the insurance, the plaintiff, as his widow, if she can maintain her action, is entitled to one thousand and thirty dollars.

It is proved that the plaintiff's husband, when he made his application for admission to the voluntary association in 1876, was sixty-four years of age, and not fifty-nine, as he stated in his application, and upon proof of his death, the directors for that cause rejected the plaintiff's claim, and in August following, the corporation affirmed the action of its directors.

The age of the applicant was a material fact. If more than sixty, he could not become a member. His representation of the fact was a warranty of its truth, and if not true, the contract was invalid. This rule is so uniformly held by the courts that no authorities need be cited.

But it is claimed by the learned counsel for the plaintiff that the vote of the corporation making the voluntary associates members of it, created a valid contract between it and Swett, notwithstanding that, by reason of the false warranty of his age, he was not legally a member of the voluntary association. We do not think so. It made those only members of the corporation who were legal members of the voluntary association. It was

merely a continuation by the defendant of the contract existing between Swett and his associates, and the defendant took the place of the first society ; or, in other terms, it was a reinsurance of Swett's life, on his application ; and any fact which rendered the contract invalid when so adopted, furnishes a good defence by the defendant to the plaintiff's action on it.

It is further claimed that the defendant, by its treasurer, received of the plaintiff, after her husband's death, two assessments against him, made just before he died, and at the time, the treasurer and some of the other officers, had information of Swett's true age ; and upon these facts it is contended that the defendant ratified the contract, or is estopped from setting up this defence.

We think this ground untenable. There is no evidence that the directors had knowledge of Swett's true age prior to their action rejecting the plaintiff's claim in July, 1883. Nor is there any evidence that the treasurer or any other officer of the corporation, acquired any knowledge or information of the fact while in the discharge of any official duty. *Fairfield Savings Bank v. Chase*, 72 Maine, 226. But assuming that the treasurer acquired notice of the fact when he received the assessments, he had no power to ratify the invalid contract. He could not admit a member and thereby make a contract of insurance, and if he had no power to make such a contract for the corporation, he had no power to validate a void contract by any act of ratification.

The fact that after Swett's death, assessments were made by the treasurer on the members, in accordance with the by-laws, and paid into the treasury of the corporation, gives the plaintiff no right to maintain her action on an invalid contract to recover the sums so paid. Nor does the assignment to the plaintiff by seventy-nine members, of the assessments so paid in by them, give her a right of action. After paying their assessments into the treasury of the corporation, the members could not maintain an action to recover it back. The money so paid in became the money of the corporation, and it had a right to retain and

control it. If the assignors could not maintain an action for it, they could give the plaintiff no power to do so by their assignment.

Judgment for the defendant.

PETERS, C. J., WALTON, VIRGIN and EMERY, JJ., concurred.
HASKELL, J., having been of counsel, did not sit.

STATE OF MAINE *vs.* DAVID S. LIBBY and others.

Franklin. Opinion December 31, 1886.

Indictment. Place.

An indictment for killing of deer, in violation of law, alleged the place of killing to be "at a Gore north of numbers two and three in range six, in said county of Franklin." *Held*, good.

ON EXCEPTIONS.

The defendants, Reed A. Smith and Eugene H. Smith, were tried jointly and found guilty of the following counts in the indictment:

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said David S. Libby, Reed A. Smith and Eugene H. Smith, at a Gore north of numbers two and three in range six, in said county of Franklin, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and eighty-five, with force and arms did kill five deer, by then and there shooting said deer with a rifle, said rifle being then and there loaded with powder and one leaden bullet, against the peace of said state, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said David S. Libby, Reed A. Smith and Eugene H. Smith, at a Gore north of townships numbered two and three, in range six, in said county of Franklin, on the fifth day of March, in the year of our Lord one thousand eight hundred and eighty-five, with force and arms did hunt and kill seven deer, against the peace of said state, and contrary to the form of the statute in such case made and provided.

" And the jurors aforesaid, upon their oath aforesaid, do further present that the said David S. Libby, Reed A. Smith and Eugene H. Smith, at a Gore north of townships numbered two and three, in range six, in said county of Franklin, on the twentieth day of March, in the year of our Lord one thousand eight hundred and eighty-five, with force and arms did hunt and kill five deer, against the peace of said state, and contrary to the form of the statute in such case made and provided."

They moved in arrest of judgment, for the following reasons :

"1st. The indictment does not allege that any offence was committed by these defendants in Franklin county or state of Maine.

"2nd. No offence is alleged against these defendants in the indictment.

"3rd. No valid judgment can be rendered on the verdict.

"4th. It does not appear that said prosecution was commenced by the warden or his deputy, of any county where the deer were alleged to be killed, nor by any other person, in any county in which the offence is alleged to have been committed, or the accused then resided or now resides.

"5th. No part of the forfeiture under said chapter goes to the state, or county, although the county is subjected to the expense of this prosecution.

"6th. The indictment does not show who is entitled to the forfeiture, if the defendants are convicted."

The motion was overruled and the defendants alleged exceptions.

Joseph C. Holman, county attorney, for the state, cited upon the question decided in the opinion : 26 Maine, 263 ; 61 Maine, 178 ; 39 Maine, 78 ; 39 Maine, 291.

H. L. Whitcomb, for defendant.

"Gore" may mean blood (which is the first definition given by Webster), it may mean a triangular piece of cloth, or it may mean a triangular piece of land. But nothing is to be taken by intendment in criminal pleadings.

In *State v. Patrick*, 79 N. C. 655 (28 Am. Rep. 340),

indictment for stealing one pound of meat, the court approves of a Wisconsin decision, declaring the term meat to be too vague and uncertain, because the term "not only applies to the flesh of all animals used for food, but in a general sense to all kinds of provisions.

The "Gore" is not alleged to be in Franklin county, but numbers two and three are alleged to be in said county.

All the facts and circumstances constituting the offence must be specifically set forth, and if any fact or circumstance which is a necessary ingredient in an offence be omitted in an indictment, the indictment is vitiated by such omission, and the objection may be availed of by the defendant on a motion in arrest of judgment. *Com. v. Moore*, 11 Cush. 600; 1 Chitty's Crim. Law, 227; *State v. Godfrey*, 24 Maine, 232.

EMERY, J. If these respondents should receive a deed of conveyance to them of real estate, with this description, "A Gore north of townships numbered two and three, in range six, in the county of Franklin," they would undoubtedly look for their land within Franklin county, and expect to find it in that county, and next north of said townships. They would not look for it in any other county or country.

The same language in an indictment sufficiently alleges a place in Franklin county.

The other alleged causes for arrest of judgment are not relied upon, and are clearly not valid. *State v. Willis*, 78 Maine, 70.

Exceptions overruled.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and HASKELL, JJ., concurred.

SAMUEL J. STEWART vs. LAURA P. STEWART.

Penobscot. Opinion January 8, 1887.

Divorce. Utter desertion.

The court is not authorized to grant a divorce for "utter desertion" when there is only a refusal of marital intercourse.

ON exceptions.

Libel for divorce filed in the clerk's office December 3, 1885. It alleged that the libellee on the first day of December, 1882, "deserted the bed of your libellant and refused wholly to cohabit with your libellant, as man and wife and to occupy the same bed with him — but on said day left his bed, and on the 21st January, 1883, wholly deserted your libellant's home," and had continued such desertion ever since.

On the second day of the January term, 1886, the libellee filed a motion to dismiss on the ground that "it appears by said libel that she did not desert said libellant until January 21, 1883, that three years have not elapsed since said January 21, 1883, prior to suing out his said libel." Thereupon the presiding justice ordered the libel dismissed and the libellant alleged exceptions.

Humphrey and Appleton, for libellant.

The character of the desertion on and after January 21, 1883, will be conceded to be sufficiently "utter and continuous."

In *Bennett v. Bennett*, 43 Conn. 313, the court decide, that desertion in the marriage relation, consists in the breaking off of cohabitation, with a determination not to renew it. In this case the divorce was denied because though cohabitation had been broken off for a sufficient time, yet it had not been with the intent not to renew it, but from necessity. The court in their opinion say that, "for the purposes of this case it is sufficient to say that the offence of desertion consists in the cessation of cohabitation, coupled with the determination in the mind of the offending person not to renew it. This intent is the decisive characteristic; mere separation may result from necessity."

In *Rie v. Rie*, 34 Ark. 37, the court decide that "actual cessation of cohabitation for one year on the part of the wife, which is intentional and without reasonable cause, entitles the husband to a divorce, though during the year she has visited his house to visit the children, and engaged in domestic duties."

In *Morrison v. Morrison*, 20 Cal. 431, the court determine that "desertion as a cause of divorce consists in the cessation of matrimonial cohabitation and the intent to desert." And in

Stein v. Stein, 5 Colorado, 55, the court held precisely the same doctrine.

In *Bailey v. Bailey*, 21 Grat. (Va.) 43, the court hold that, "the abandonment which, under the laws of Virginia, entitles the party abandoned to a divorce, consists of an actual breaking off of matrimonial cohabitation with intent to abandon and desert."

In *Latham v. Latham*, 30 Grat. (Va.) 307, the court decide desertion to be first, the breaking off of the matrimonial cohabitation, and second, of an intention to desert in the mind of the offender, and that both of these must combine to make the desertion complete.

In *Sergent v. Sergent*, 33 N. J. Eq. 204, the court say, that to establish desertion, three things must be proved : first, cessation of cohabitation, second, an intention in the mind of the defendant to desert, and third, that the desertion was against the will of the complainant.

The court of New Hampshire in *Dyer v. Dyer*, 5 N. H. 271, in a forcible opinion hold the law to be as we claim it.

The only case we find, which seems to recognize a different doctrine is *Southwick v. Southwick*, 97 Mass. 327. The application for divorce in that case was based on the general statute of Mass. of 1860, c. 107, § 7. By that statute the sole cause of divorce is desertion, and the case referred to holds that desertion means the abandonment of all the duties and obligations connected with the married relation, the ancillary and subordinate duties as well as the chief and central element; matrimonial intercourse. But even this case is modified and greatly weakened by the case of *Magrath v. Magrath*, more recently decided by the same court and reported in 103 Mass. 577, where the court hold and decide that desertion may exist where there is a continued observance by the party deserting of some of the most important ancillary obligations.

The learned author in Bishop on Marriage and Divorce, remarks in relation to *Southwick v. Southwick*, that "looking at this question in the light of legal principle it becomes plain that if the result arrived at by the Massachusetts court is sound, it is for reasons that have not yet been judicially assigned.

"If then, not from any justifiable *causum* but wilfullness, or a desire to injure, or from malice, a married party takes a separate room in the house, and not as a mere temporary expedient, not on consideration of health, but as a wilfull, irrevocable act, abandons forever all matrimonial intercourse, the adjudged law, speaking through its principles, rather than by a resolving of the exact question, makes it desertion." 1 Bish. on Mar. & Div. §§ 778, 779. See Vol. 1, § 870 and note 1; also § 777, note 2, as to meaning of word cohabitation, and that it means matrimonial intercourse, or such living together as that matrimonial intercourse must be inferred.

Charles Hamlin and J. Hutchings, for the libellee.

EMERY, J. The power of the court to decree divorces, is derived solely from the statute. It has no common law jurisdiction over such matters. It can decree a divorce for such cause only as the legislature authorizes. The only statute authority relied upon in this case, is that clause authorizing the court to decree a divorce for "utter desertion continued for three consecutive years, next prior to the filing of the libel."

This case, therefore, presents the question whether the legislature, by that statute, intended to authorize a divorce where one party, without good cause, denies the other sexual intercourse for three consecutive years.

In England formerly, divorces were not allowed for desertion. The only remedy for such a wrong, was a suit in the Ecclesiastical courts for the restitution of conjugal rights. But, those courts, while requiring the offending party to return and live with the libellant, never undertook to compel the granting of sexual intercourse. They made a clear distinction between "marital intercourse," (sexual intercourse) and "marital cohabitation" (living together). The latter was a right to be enforced by the courts. The former was a right to be enforced only *in foro conscientiae*. Lord STOWELL, in *Foster v. Foster*, 1 Hag. Con. 154, said, "the duty of matrimonial intercourse cannot be compelled by this court, though matrimonial cohabitation may." In *Orne v. Orne*, 2 Adams, 382, the precise question arose.

It was a libel by the wife for restitution of marital rights. It appeared that the husband lived with her in the same dwelling, but refused to have sexual intercourse with her. The libel was dismissed on the ground there was no power in the court to remedy such a refusal.

It was also early held in England that such refusal was not an act of cruelty. *Aguilar v. Aguilar*, 1 Haggard, 776. It has been held in America that such refusal is not an act of cruelty, and that it will not justify desertion, nor any other marital dereliction by the other party. *Reid v. Reid*, 24 N. J. Eq. 332; *Eshback v. Eshback*, 23 Pa. St. 343; *Cowles v. Cowles*, 112 Mass. 298. It has also been expressly held that such refusal is not the desertion contemplated by the statutes authorizing divorces for desertion. *Southwick v. Southwick*, 97 Mass. 327; *Steele v. Steele*, 1 McArthur (D. C.), 505.

Decisions are cited from the courts of some other states, which seem to hold the contrary doctrine. There is a difference between the statutes of those states, and our statute. Our statute uses the phrase, "utter desertion." The statutes upon which the opposing decisions are based, omit the word, utter. The language of our statute, enacted in 1883, is the same verbatim as that in the Massachusetts statute (Pub. Stats. of 1882, c. 143, § 1), which had already received judicial construction in *Southwick v. Southwick*, *supra*. The inference is, that our legislature in using the same language, intended the same construction.

Sexual intercourse is only one marital right or duty. There are many other important rights and duties. The obligations the parties assume to each other, and to society, are not dependent on this single one. Many of these obligations, fidelity, sobriety, kind treatment, &c., have legal sanctions, and can be enforced, or their breach remedied by legal process. This obligation in question is of a nature so personal and delicate, and dependent so much on sentiment and feeling, that the English Ecclesiastical courts, though reaching far into the privacy of domestic life, have stopped short of this. We do not think our legislature intended to call the denial of this one obligation an "utter desertion," while the party might be faithfully and

perhaps meritoriously fulfilling all the other marital obligations.

Exceptions overruled.

WALTON, DANFORTH and FOSTER, JJ., concurred.

HASKELL, J. I concur in the opinion, as I understand it to hold that refusal of sexual intercourse does not amount to utter desertion, so long as other marital rights and duties are enjoyed and performed under the marital relation; and that, it is not of itself, in law, a cause for divorce; but that, whether from long continuance without cause, in extreme cases, it may not become "cruel and abusive treatment," is a question of fact, to be determined in each particular case, upon its own particular facts and circumstances. *Holyoke v. Holyoke*, 78 Maine, 404.

PETERS, C. J. I concur in the result arrived at by Judge EMERY, and agree to the statement that a refusal of marital intercourse, while marital cohabitation continues, does not amount to "utter desertion," a cause of divorce prescribed by our statutes.

But so far as the opinion of the learned Judge carries an implication that a refusal of marital intercourse may not be so extreme as to amount to "cruel and abusive treatment," another cause of divorce prescribed by our statutes of divorce, I do not concur. Impotence is a cause of divorce in this State. What is the difference to the husband, whether the wife *can not*, or *will not*, assent to marital intercourse? If a divorce lies in the first case, *a fortiori* should it in the latter — when the case presents an inexcusable and long continued refusal — not such as this case — but a clearly extreme case.

LEWIS F. STRATTON and others vs. BENJAMIN D. COLE.

Penobscot. Opinion January 8, 1887.

State lands. Deeds of land agent. Mortgage. Liens. Stat. 1832, c. 30.

A deed from the State Land Agent, under Stat. 1832, c. 30, containing a stipulation that when the purchase money is paid "then this is to be a good

and sufficient deed to convey said lots, otherwise to be null and void, and said lots to be and remain the property of said state," does not convey the legal title.

The title in such a case remains in the state until the payment of the purchase money; and an extension of the time of payment does not operate to pass any title.

ON REPORT.

The opinion states the case.

Humphrey and Appleton, for plaintiffs.

A condition does not defeat the estate, although broken, until entry by the grantor or his heirs, and then he is in as of his former estate. He must make an actual entry, for the breach of the condition, otherwise no forfeiture is incurred, and the title remains unimpaired in the grantee. *Guild v. Richards*, 16 Gray, 318.

In *Wilbur v. Toby*, 16 Pick. 177, and in *Thompson v. Bright*, 1 Cush. 420, it was held that the statute of 18 Henry VI., c. 6, was in force in the Commonwealth of Massachusetts. That statute provides, says WILDE, J., in *Thompson v. Bright*, that all letters patent, or grants of lands and tenements, before office found or returned into the Exchequer, shall be void.

An "inquest of office" or "office found" was an inquiry made by the king's officers. See 8 Bac. Abr. 98, title "prerogative."

It is one of the principles of the common law, upon which the security of private property from the grasp of power depends, that the crown can only take by matter of record. 3 Bl. Comm. 259.

The construction of this statute, 18 Henry VI., c. 6, was very fully considered in *Doe v. Redfern*, 12 East's 96.

In *Jackson v. Adams*, 7 Wend. 368, it was declared that if an estate escheat, by the death of the tenant without heirs, yet until office found, the state has no right to enter and take possession.

In the *People v. Brown*, 1 Caines' Rep. 416, the defendant entered upon certain lands, which he claimed under a conditional grant, the condition of which was never performed. By direction of the legislature of New York, the Attorney General

filed an information against the defendants, for an intrusion on said lands. Judgment was ordered for the defendants, there having been no inquest of office.

In the great case of *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 629, Judge STORY, for the court, says that Denny Fairfax had a complete though defeasible title by virtue of the devise, and as the possession was either vacant or not adverse, of course the law united a seizin to his title in the lands in controversy, and this title could only be divested by an inquest of office, perfected by an entry and seizure when the possession was not vacant. And no grant by the commonwealth, according to the common law, could be valid, until the title was by some means fixed in the commonwealth.

This deed was given in 1834, and the notes were severally due in October, 1834-5-6-7. The first two notes were paid, but the last two notes it is alleged were not paid at maturity, and if the payment of these notes constituted a condition precedent, which we deny, (see *Spofford v. True*, 33 Maine, 284,) the performance of such condition has been waived by the state, and a condition subsequent substituted therefor.

Chap. 84, of the laws of 1840, is identical in language with c. 352, stat. 1838, excepting that it still further extends the payment of the interest until July 1st, 1840, and the payment of the balance due on said notes, for twenty-four months, from the approval of the act. The act was approved March 18th, 1840, so that the payment of the balance was extended until March 18th, 1842.

Now the case of *Thompson v. Bright*, 1 Cush. 420, authoritatively settles the soundness and accuracy of our proposition, that by these enactments, enlarging the time of payment, the condition precedent contained in the grant to the Pierces, was converted into a condition subsequent.

"If the grant be a public one, it must be asserted" (say the court in *Schulenberg v. Harriman*, 21 Wallace,) "by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be

some legislative assertion of ownership of the property for breach of the condition." Or it may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings. *U. S. v. Repentigny*, 5 Wall. 267.

These acts no where dispensed with the legal prerequisites necessary to be taken, in order to work a forfeiture, for condition broken, either expressly or inferentially.

Now an office of entitling is necessary to give the notoriety and fix the title in the sovereign. So it was adjudged in the *Page case*, 5 Co. 22, and has been uniformly recognized, says STORY, J., in *Fairfax's Devisee v. Hunter's Lessee*, *supra*.

No individual can assail the title the state has conveyed, on the ground the grantee has failed to perform the conditions annexed. *Schulenberg v. Harriman*, *supra*, citing many authorities. And the reason of the rule is tersely stated in *Hooper v. Cummings*, 45 Maine, 366.

In 1841 the Pierces released to the state all their right, title and interest, in and to Lot 8, and other lands. Nothing passed to the state by their release. *Coe v. Persons Unknown*, 43 Maine, 432; *Walker v. Lincoln*, 45 Maine, 67.

Barker, Vose and Barker, for the defendant, cited: Smith's Laws of 1821, c. 48; R. S., 1841, c. 127; R. S., 1857, c. 93; R. S., 1883, c. 93; 11 Mass. 193; 16 Pick. 177; 60 Am. Dec. 712; *Ken. Prop. v. Springer*, 4 Mass. 416; *Ken. Prop. v. Laboree*, 2 Maine, 275; *Higbee v. Rice*, 5 Mass. 344; *Jackson v. Elston*, 12 Johns. 454; *Little v. Megguier*, 2 Maine, 176.

EMERY, J. In this real action both parties claim title from the state, under deeds from the land agent. The deed dated April 4, 1834, from the land agent to the Pierces, under whom the demandants claim, is the earlier deed and is to be first considered.

The demandants contend that by this deed the fee in this land passed from the state to the Pierces; that the state only retained a right to recover back the fee, in case payment was not made. They cite authorities tending to establish the proposition that in

such cases, where the fee once passes, it does not revert in the state by the mere failure of the grantees to perform the condition ; that there must be some affirmative proceedings by the state, by suit, by inquest of office, or some other, to transfer the fee and seizin back to the state ; that until such proceedings, the fee is still in the grantee, though the conditions remained unperformed. They contend further that if the condition in this deed was a condition precedent, it was changed into a condition subsequent, by the extension by the state of the time for the performance of the condition, and thus was brought within the rule above stated.

It is necessary, therefore, to ascertain what estate in this land passed to the grantee under that deed, and what estate remained in the state. The state was bound by such deed only as it authorized the land agent to give, and the grantee could only receive such estate in the land as the state authorized the land agent to convey. The grantee of the state and those claiming under him, would be bound by any existing statute at the time of the sales and the deeds. The effect of the deed must be judged by the statutes, as well as by the terms of the deed.

The earliest statute, act of 1824, ch. 258, required one-half cash, and "a good and sufficient surety" for the balance before giving the deed. The act of 1828, ch. 393, reserved for the state a lien on all timber lands, and required "good sureties," or notes and a mortgage in the case of other sales. The act of 1831, ch. 510, required in the case of settling lands, sufficient personal security, or notes secured by a mortgage of the land, before giving the deed. The act of 1832, ch. 30, § 2, which was in force at the date of this deed, provided that "in the sales of land by the land agent, the lien which the state retains in the land as security for the payment of the purchase money, may be expressed in the deed of conveyance from the state, instead of taking a mortgage thereof."

At the first, no deed could be given without cash, or good personal security. Then a mortgage back was substituted for personal security. Then for greater convenience, this mortgage security was to be expressed in the deed from the state, instead

of a separate and additional instrument. This course saved expense and the inconvenience of recording and preserving large files of mortgages.

It seems clear that, however expressed and in whatever instrument, the lien or estate to be retained by the state, was at least as effectual and great as that of a mortgagee. To retain a lien for the purchase money, is to retain the legal title, the *proprietas*, though the thing may go into the care of the vendee. *Oakes v. Moore*, 24 Maine, 214. The various legislative acts show that the state was to retain this much. Whatever language the land agent used in writing the deed, it could convey no more than the statutes contemplated, no greater estate than that of a mortgagor. Such, indeed, seems to have been the nearly contemporaneous construction of these statutes. In the revision of 1841, they were expressed in this language, "and the liens above mentioned, being so retained by the terms of the land agent's deed, shall be equivalent to a mortgage of the same land to the state." The land agent's deed we are considering was drafted upon the same theory. There is in it no provision for a reverter. It provides that if the notes are paid, "then this to be a good and sufficient deed to convey said lots; otherwise to be null and void, and said lots to be and remain the property of the state." It is analogous to a bond for a deed, authorizing the obligee to enter, but carefully retaining the title until payment.

That the legislature understood that the fee was unconveyed, that no proceedings were necessary to revest it in the state, is evident from the act of 1842, ch. 33, § 4. This act provided that all lands which had been sold by the land agent prior to August 1, 1841, (including this sale of course) might be declared by the land agent to be forfeited lands, upon the non payment of the notes given for the same, etc. It was also provided in the same act that the land agent might sell such lands.

It appears that the last two notes named in this deed have never been paid. It also appears that this land was afterwards placed by the land agent upon the list of "Forfeited Lands" in the land office, and conveyed by the land agent, by deed of October 7, 1845, under the act of 1842. The grantee under

this last deed went into possession of the land, and his title and possession have come to the tenant in this action. A mortgagee in this state has the legal title, and if he or his assigns be in possession, the mortgagor can not recover possession until he shows affirmatively a performance of the condition. *Gilman v. Wills*, 66 Maine, 273; *Jewett v. Hamlin*, 68 Maine, 172.

If our construction of the statutes and deeds is correct, this tenant can not be evicted by these demandants, so long as the purchase money remains unpaid. Under this construction, the extensions of time of payment, allowed in the subsequent resolves, did not destroy the lien, did not pass the title. Such extensions perhaps waived a forfeiture, extended the time for redemption, but did not extinguish the state's legal title, and leave to it only a right of action.

Judgment for the tenant.

PETERS, C. J., WALTON, DANFORTH, FOSTER and HASKELL, JJ., concurred.

LIZZIE A. FITZGERALD by BURKE L. FITZGERALD, her father and next friend, *vs.* GEORGE DOBSON and another.

Somerset. Opinion January 4, 1887.

Trespass. Bite of a dog. Excessive damages. R. S., c. 30, § 1. Evidence. Facts stated upon which it was determined by the court that a verdict of \$1,450, (which is to be doubled) was not excessive in an action by a young girl, under R. S., c. 30, § 1, against the owner of a dog by which she was bitten.

In such a case it is not error: (1) to exclude a question to a physician "if he thought there would be any difficulty, in the hands of a good physician in having" the plaintiff "walk in a reasonable time;" (2) to admit testimony that the same dog had previously attacked and bitten another girl; (3) to admit the testimony of a physician, of his observation of another case where paralysis resulted from injury; (4) to exclude a hypothetical question on cross-examination of a physician when the facts supposed had not, at that time, appeared in any testimony; (5) to refuse to instruct the jury, "that the plaintiff can not recover damages, except those caused by the bite of a dog, because nothing else is declared on."

ON motion to set aside the verdict and exceptions.

The exceptions, relied upon in argument, were:

(1.) To the ruling of the presiding justice in excluding the following question to Dr. George W. Martin, a physician, called by the defendant.

Mr. Baker — "The idea I wanted to get at was, if the doctor thought there would be any difficulty, in the hands of a good physician, in having that little child walk within a reasonable time."

(2.) To the ruling of the presiding justice, in admitting in evidence, the testimony of a female witness, that she was attacked and bitten by the same dog, before the plaintiff was bitten.

(3.) To the ruling of the presiding justice in admitting, in evidence, the testimony of a physician called by the plaintiff, relating to a patient he once attended where paralysis resulted from an injury.

(4.) To the ruling of the presiding justice in excluding the following question put in cross-examination of a physician called by the plaintiff, the facts assumed not having been testified to at the time the question was asked: "If during a simple attack of the measles, the patient should have twice, during the attack, paralysis, loss of control over the left leg, would not that indicate the existence at that time of spinal disease?"

(5.) To the refusal of the presiding justice to give the following requested instruction:

"That the plaintiff cannot recover damages here except those caused by the bite of the dog, because nothing else is declared on."

The verdict of the jury for \$1450, was for single damages and judgment was to be rendered for double that amount.

On the day before the verdict was rendered the plaintiff filed the following amendment to the writ to which the defendant objected:

"Also for that the said defendants at said Pittsfield on said 25th day of June, 1884, were the keepers of a large English bull dog or mastiff and while the said plaintiff was lawfully traveling in the public street at said Pittsfield on said June 25th 1884, she was suddenly set upon, attacked and assaulted by

said English bull dog or mastiff and violently thrown down, and then and there bitten in the left hip or thigh by said dog, and was then and there greatly excited and frightened by the sudden assault and violence of said dog and was then and there greatly injured thereby; and by reason of said injuries caused by said dog of said defendant's, the plaintiff became lame and disordered and sick, especially in her left leg, and has ever since suffered great pain in said leg and hip, and in other parts of her body; and has become greatly disabled, and unable to walk, and has remained sick, disordered in body and lame and disabled from the time she was so injured by said dog to the present time; and by reason of said injuries is liable to remain sick, disordered and lame during life."

D. D. Stewart, for the plaintiff cited: *Com. v. Pierce*, 11 Gray, 447; *Thompson v. Dudley*, 66 Maine, 515; *Moore v. Holland*, 36 Maine, 15; *Dane v. Treat*, 35 Maine, 198; *Day v. Moore*, 13 Gray, 522; *Erskine v. Erskine*, 64 Maine, 214; *Com. v. Merriam*, 14 Pick. 518; *Com. v. Lahey*, 14 Gray, 91; *Huntsman v. Nichols*, 116 Mass. 521; *State v. Witham*, 72 Maine, 535; *East Kingston v. Towle*, 48 N. H. 57; *Reynolds v. Hussey*, 6 East. Rep. 423; *Lawson's Ex. & Op. Ev.* 129, 130; *Boardman v. Woodman*, 47 N. H. 120; *Com. v. Rogers*, 7 Met. 504; *Terre Haute R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. Rep. 168); *McNamara v. Clintonville*, 62 Wis. 207 (51 Am. Rep. 722); *Baltimore R. Co. v. Kemp*, 61 Md. 74 (47 Am. Rep. 381, note); *Same v. Same*, 61 Md. 619 (48 Am. Rep. 134); *Beauchamp v. Saginaw*, 50 Mich. 163 (45 Am. Rep. 30); *Worster v. Bridge Co.* 16 Pick. 541; *Shaw v. Boston & Worcester R. Co.* 8 Gray, 81.

Messrs. Baker, Baker and Cornish (with whom were *J. W. Manson* and *C. A. Farwell*) for defendants.

1. The defendants rely with full confidence on their exception to the exclusion of Dr. Martin's testimony. Mr. Lawson in his recent work on expert evidence, on p. 107, rule 27, states that the opinion of a medical man upon the condition of the human

system, or the likelihood of recovery, is admissible, and on pp. 114 and 115, under D he cites various cases illustrating the point; and such is, undoubtedly, familiar law.

2. It is submitted that the testimony of Ethel Brackett, that she had been previously bitten by the defendant's dog, was inadmissible.

At common law the action for damages by a dog, is based on the negligence of its owner, and hence cannot be maintained without proof of scienter. *Le Forest v. Tolman*, 117 Mass. 109; 1 Thompson on Negligence, p. 218, § 32.

And in such an action evidence of a habit of a dog to bite is receivable, as tending to show knowledge on the part of the owner. But even then we submit the fact sought to be proved must be brought home to the owner's knowledge. That is the gist and object of the evidence. *Le Forest v. Tolman*, 117 Mass. 110; *Shearman and Redfield on Negligence*, § § 189, 190, 191, and cases cited in the note.

The evidence if strong enough, is perhaps also admissible at common law to show motive on the part of the defendants and to lay the foundation for punitive damages.

But under our statute the action is not based on negligence, but is arbitrary and in a sense penal, and requires no proof but the fact of defendant's ownership and plaintiff's injury.

Hence in the statutory action no scienter need be approved. *Pressey v. Wirth*, 3 Allen, 191; 1 Thompson on Negligence, p. 218, § 32 and cases cited in note.

Under such a statute the evidence received is in any view wholly irrelevant and inadmissible and only tends, as here, to prejudice the defendant and unjustly to swell the already penal damages given by the statute. This has been distinctly passed upon by the Supreme Court of New Hampshire, under a statute substantially the same as ours. The case is, *East Kingston v. Towle*, 48 N. H. 57; 2 Am. Rep. 174. See also *Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778.

In *Whitney v. Bayley*, 4 Allen, 173, the court hold that the introduction of immaterial evidence is no ground for a new trial if the jury are instructed to disregard it, and there is no reason

to apprehend that it could have prejudiced the minds of the jurors. See also, *Railroad v. Levy*, 59 Texas, 542 (46 Am. Rep. 269).

3. We urge also upon the court's attention the exception to the narration by Dr. Wilbur, the plaintiff's witness, on direct examination, of the symptoms, history, results and assumed causes of a case which occurred in California, from some accident of which the witness had no personal knowledge.

In *Clark v. Willett*, 33 Cal. 534, the court held that an expert cannot, on direct examination be questioned as to the facts and history of cases on which he may wholly or partly have formed his opinion.

It is clear that the attempted withdrawal was unavailing for two reasons.

First, that the evidence was not in fact permitted to be withdrawn, nor is it pretended that the jury were instructed to disregard it. Second, because at the stage of the case the evidence could not legally be withdrawn. *Railroad v. Levy*, 59 Texas, 542 (46 Am. Rep. 269).

4. We contend that the question asked by the defendants of Dr. Howe, the plaintiff's attending physician, should have been admitted. It was a hypothetical question based on an assumed fact not then in evidence, but which was put in evidence by the defendants' witness, Dr. Taylor.

5. We submit that the declaration sets out no injury except from the bite of the dog. Under a declaration somewhat similar, and under practically the same statute, the Supreme Court of Massachusetts sustained the ruling of the court below, that "unless it was proved that the dog bit the plaintiff the action could not be maintained." *Searles v. Ladd*, 123 Mass. 580.

WALTON, J. As the plaintiff, a little girl, nine years of age, was walking quietly along the street, she was suddenly set upon by the defendants' dog, a large English mastiff, and thrown down upon the ground, and bit with such force and violence that the dog's teeth went through her clothing and into her flesh, and inflicted a wound upon her left hip nearly two inches in length

and half an inch or more in depth. For these injuries she has obtained a verdict for \$1,450.

The first question is whether this amount is so large as to require the court to set the verdict aside and grant a new trial. We do not think it is. The assault was a severe one. Not only was the plaintiff severely wounded, but she must have been greatly shocked and frightened. And the evidence tends to show that she was taken sick immediately after the assault and confined to her bed for several weeks, and that she has been lame ever since. There is no reason to believe that she is shamming. In fact, we understand it to be conceded that she is now suffering from "hip disease." The defendants contend, and it may be true, that this is the result of hereditary scrofula, and not the bite of the dog. To this, it is replied, that while it may be true that the plaintiff has a naturally weak and delicate constitution, and was for that reason more likely to be seriously affected by wounds and shocks and frights, still, the assault of the dog must have been the direct and proximate cause of much, if not the whole, of her subsequent sufferings and sickness, and that the amount assessed by the jury is by no means excessive. We have read the evidence with care, and in our opinion another trial would be as likely to result in an increase as a diminution of the damages. Certainly the defendants can have no reasonable expectation of reducing the damages enough to cover the costs of another trial. The trial already had lasted eight days, and the expense for counsel and for witnesses, and especially for the medical expert witnesses from a distance, must have been large; and there is no reason to suppose that another trial would occupy less time or be less expensive. A new trial would not therefore be likely to be of any benefit to the defendants. It might result in a serious loss to them. To the plaintiff it would be a great hardship. That she is lame and feeble there can be no doubt. During the trial already had, she was subjected to many painful and indelicate examinations. Her spine was examined by percussion. Her diseased limb was tested by pressure and by bending and flexing the joints. In one instance, in a state of nudity, she was laid upon a board and thus examined. And all

this, not with a view to her medical treatment, but to ascertain the extent of her injuries, and whether or not she was shamming. Surely, to justify granting another trial, and again subjecting this little girl to similar treatment, the court ought to have strong reasons. We find no such reasons in the amount of the verdict.

Nor do we find any thing in the exceptions to justify granting a new trial. All the rulings admitting and excluding evidence, and the instructions to the jury, were, under the circumstances disclosed in the report, so obviously correct, that we do not deem it necessary to discuss them.

Motion and exceptions overruled.

Judgment on the verdict.

PETERS, C. J., DANFORTH, EMERY, FOSTER, and HASKELL, JJ., concurred.

EMERY ROBBINS and LEVI L. ROBBINS, in equity,

vs.

WALDO LODGE, No. 12, INDEPENDENT ORDER OF ODD FELLOWS.

Waldo. Opinion January 17, 1887.

Equity. Dividing property of voluntary association. Property contributed for special use.

A voluntary association holding a fund of two thousand dollars, contributed by its members and divided into shares of twenty dollars each, for which certificates were issued, used the fund in repairing and furnishing a hall to be used as an Odd Fellows' Hall. *Held*, that equity would not, at the suit of the owners of three shares, compel the others to purchase those shares, or submit to have the furniture removed and sold and the proceeds divided, while the hall was being used as an Odd Fellows' Hall, though by a different lodge.

On report of the presiding justice to be heard on bill, answer and proof.

The plaintiffs were the owners of three shares in the Odd Fellows' Hall Association, holding certificates like the following :

No. 10. Odd Fellows' Hall Association. One share.

This certifies that A. R. Carter, of Belfast, is proprietor of one share of the Capital Stock of the Odd Fellows' Hall Association of Belfast, on which has

been paid the sum of twenty dollars. These shares are transferable by assignment on the back hereof, to Members in good standing of the Independent Order of Odd Fellows only, the same being delivered to the Secretary and entered upon the Records of the Corporation.

These Shares may be redeemed by Belfast Lodge No. 41, I. O. O. F., at its option, at par value with Interest at 6 per cent. per annum from date hereon.

In Witness Whereof, this certificate is signed by the President and Secretary of said Association and countersigned by the proper Officers of the Lodge, at Belfast, this twenty-sixth day of April, A. D. 1876.

(A true copy.) F. A. Follett, N. G. William W. Castle, President.

R. G. Dyer, Rec. Sec'y. Attest: R. G. Dyer, Sec'y.

Capital Stock, \$2000. 100 Shares, \$20.00 each.

Transferred to E. and L. L. Robbins. (Signed) A. R. Carter.

Messrs. Thompson and Dunton, for plaintiff.

This court has the same power in equity to adjust the interests of part owners of personal property, that it has to adjust the interests of part owners in real estate. R. S., c. 77, § 6, Item VI; Story's Eq. Jur. § 466.

In a recent case in New Hampshire, the court in their opinion say: "Whatever is capable of being divided may be the subject of partition in equity, and the inconvenience or difficulty of making partition is no objection. Moreover, for the sake of convenience, in equity, a recompense may be made by a sum of money to one of the parties, so as to prevent injustice or unavoidable inequality; or the court may order a sale of the subject matter and a division among the several owners, according to their respective titles, as its powers are adequate to a full compensatory adjustment." *Allard v. Carleton*, 4 Eastern Rep. 759; see Story's Eq. Jur. § § 654, 656.

Had the property in controversy belonged to Belfast Lodge at the time its charter was taken away, the Grand Lodge would not thereby have become the owner of said property, but it would still have remained the property of the members of said lodge. *District Grand Lodge No. 5 v. Independent Order B'nai B'rith Jed'jah Lodge No. 7*, (Md. case,) 4 Eastern Rep. 657.

William H. Fogler, for the defendant.

WALTON, J. It is the opinion of the court that the facts proved in this case do not entitle the plaintiffs to the relief

prayed for. There is a want of equity. The furniture of which the plaintiffs claim to be part owners, was purchased for a special purpose, and so far as appears, is now being used for that very purpose. We think it would be contrary to equity and good conscience for a minority of the owners, contrary to the wishes of the majority, to divert this property from the uses to which it was originally dedicated. The case shows that an association of individuals raised a fund of about two thousand dollars to fit up the Odd Fellows' Hall in Belfast. A large portion of this fund was expended in repairing and frescoing the hall. The balance was expended for carpets, chairs, desks and settees. This was in 1876. So far as appears, the carpets and furniture remain in the same positions in which they were originally placed, and are used for the same purposes to which they were originally dedicated. Not by the same lodge, but by their successors under a new charter and a new name. Now, can any one say that in equity and good conscience a small minority of the owners may compel the majority to purchase their interests or submit to have the carpets torn up and the furniture removed and sold for whatever price can be obtained and the proceeds divided? Can those who have thus taken upon themselves a common burden for a charitable or benevolent purpose thus escape from their share of it and throw it upon their associates or defeat the whole enterprise? Would not such a course be in violation of the original understanding or compact between the parties? Would it not be a breach of good faith? We think so. And this court, sitting as a court of equity, can not sanction such a proceeding. We think the furniture must be allowed to remain where the original purchasers of it put it, and subject to the uses to which they dedicated it. We should as soon think of sanctioning the removal and sale of Bunker Hill monument, on petition of some of those who contributed to the fund by which it was erected, as to allow this furniture to be withdrawn from the uses to which its original proprietors dedicated it. *Hinkley v. Blethen*, 78 Maine, 221.

Bill dismissed with costs.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

JOHN WHITE vs. INHABITANTS OF LEVANT.

Penobscot. Opinion January 17, 1887.

Town agent, compensation of.

A town agent can not maintain an action to recover compensation for his official services, unless the town has voted to pay him.

The statutes of the state annex no compensation to the office of town agent.

ON motion to set aside the verdict.

Assumpsit for services and expenses as town agent.

Barker, Vose and Barker, for plaintiff.

Was the town of Levant, through its agents, justified in appearing with witnesses to show cause why the prayer of the petitioners should not be granted, and to pay for the town money necessary for the production of such witnesses, and the defense of the suit *Kenduskeag v. Levant*? For it is an elementary principle of law too familiar to repeat that "*qui facit per aliam qui facit per se*," and that "advances made by an agent in the proper execution of a regular authority, are to be repaid by his principal, with this qualification, that the transaction out of which they arise is not of an illegal nature." Dunlap's Paley on Agency, 4th ed., and that the rule applies as well to municipal corporations as to individuals. *Sanborn v. Inhab. of Deerfield*, 2 N. H. 251; *Powell v. Trustees of Newburgh*, 19 Johns. 284.

Jasper Hutchings and Charles Hamlin, for the defendants, cited: Broom's Legal Maxim's, *170; *Otis v. Stockton*, 76 Maine, 506; Dil. Mun. Corp. § 230; *Sikes v. Hatfield*, 13 Gray, 347; *Farnsworth v. Melrose*, 122 Mass. 268; *Farwell v. Rockland*, 62 Maine, 296; *Miller v. Whittier*, 36 Maine, 577.

WALTON, J. The only question we find it necessary to consider is whether one who has accepted a town office to which neither the legislature nor the town has annexed any compensation, can maintain an action to recover compensation for his

official services. It is well settled that he can not. The compensation of some town officers is provided for by statute. The compensation of assessors, selectmen, and overseers of the poor, is thus provided for. R. S., c. 6, § 102. Such compensation may of course be recovered, whether the town is willing to pay it or not. So, if the town has expressly voted a compensation. But in the absence of any such statute or vote, no compensation can be recovered. *Talbot v. East Muchias*, 76 Maine, 415; *Sikes v. Hatfield*, 13 Gray, 347; *Walker v. Cook*, 129 Mass. 578; *Dillon's Mun. Corp.*, (2d ed.) § 169.

The plaintiff has obtained a verdict on a claim made up largely of charges for his official services as town agent. Unfortunately for him, neither the town nor the legislature has annexed any compensation to his office. The verdict, therefore, is contrary to law, and must be set aside.

The motion is sustained, the verdict set aside, and a new trial granted.

PETERS, C. J., DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

78 569
86 591

STEPHEN L. PURINTON *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion January 18, 1887.

Railroads. Crossing. Negligence. New trial.

When the evidence is conflicting on the point upon which the case turned, the verdict will not be set aside unless it is clearly against the weight of evidence.

It is the duty of those in charge of a train of cars to keep a sharp lookout, in order to avoid collisions with teams at crossings.

ON motion to set aside the verdict.

The opinion states the material facts.

Wilbur F. Lunt, for the plaintiff.

Drummond and Drummond, for the defendant.

WALTON, J. The plaintiff has recovered a verdict of one hundred and thirty-two dollars and forty-seven cents, against

the Maine Central Railroad Company, for damage to his furniture occasioned by the collision of a freight train with a team on which the furniture was loaded. The only question is whether the verdict is so clearly against the weight of evidence as to require the court to set it aside and grant a new trial.

We do not think it is. The collision occurred at a crossing in the town of Deering. It was in March, and the ground was bare near the railroad track, and a little distance from the track the highway was icy and slippery. The plaintiff's goods were on a sled drawn by four horses. When the sled crossed the track it struck upon the bare ground and stuck. The horses had reached the icy portion of the highway, and when they attempted to pull hard enough to start the load they would slip, and one of them fell. The teamster was notified that a train was approaching, and he seems to have made every effort possible to get out of the way, but he was unable to do so. To add to his embarrassment, the gate tender let a swing gate down on to his load. It was then impossible for him to move forward without tearing his load to pieces or breaking the gate. Several bystanders tried to assist him; and one of them told him not to be excited, that the train-men saw him and were slowing up the train. And he was finally told that the train had stopped. But this proved not to be true, or, if true, the train started again and moved down upon him at the rate of about four miles an hour, and in attempting to pass him, struck the hind end of his load and knocked it to pieces.

Could not this accident have been avoided by the exercise of reasonable care by the gate tender and the engineer in charge of the train? It has been decided again and again that it is the duty of the traveler upon a highway to look carefully for approaching trains before attempting to cross a railroad track. But the duty of keeping a sharp lookout does not rest upon him alone. It is equally the duty of those in charge of a train of cars to keep a sharp lookout. Horses are liable to become unmanageable at railroad crossings. They may become frightened, or, as in this case, a team may get stuck, and be unable to move on; and it is the duty of those in charge of trains of cars to be

watchful, and if they see that such an accident has happened, to endeavor to stop their trains in season to avoid a collision. It is true that this collision occurred in the evening, and the gate tender says he did not see the load of goods on which he lowered the gate. And the engineer in charge of the train gives the same excuse. He says it was very dark, and he did not see the load of goods till the moment it was struck. The evidence is conflicting with respect to the amount of light. This is probably the hinge on which the case turned. The jury probably found that it was light enough for the gate tender and the engineer to have seen the team and the predicament it was in, if they had been reasonably vigilant, and had kept a proper lookout; and if they did so find, we do not think the verdict is so clearly against the weight of evidence as to require us to set it aside.

Motion overruled. Judgment on the verdict.

PETERS, C. J., VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

JOHN L. WINSHIP

v8.

PORTLAND LEAGUE BASE BALL AND ATHLETIC ASSOCIATION.

Cumberland. Opinion January 18, 1887.

Contract for services. Discharge of employee without cause. "Satisfactory."

A contract for employment provided that if the employee failed to comply with the agreements or rules of certain base ball clubs, or became careless or indifferent, or conducted himself in such a manner as to injure the employer, or became ill or otherwise unfit from any cause whatever, in the judgment of the employer, to fulfill in a satisfactory manner his duties, then the employer should have the right to discipline, suspend or discharge him, and should be the sole judge of the sufficiency of the reason for so doing. *Held*, that his discharge without the existence, or an adjudication of the existence of a reason, and without alleging any reason, was a breach of the contract.

ON report from superior court.

An action for damages for breach of a contract under the

rules of the Eastern New England Association of Base Ball Clubs, by which the plaintiff engaged to manage base ball for the defendant for six months, commencing April 15, 1885, for seven hundred and eighty dollars.

The eighth clause of the contract was as follows :

"Eighth. And it is hereby mutually agreed by the said parties hereto, that should the said party of the second part, at any time or times, or in any manner, fail to comply with the covenants and agreements herein contained, or any of them, or with any of the rules and regulations of the said, the Eastern New England Association of Base Ball Clubs, or with the rules and regulations of the said party of the first part, which now are or may hereafter from time to time be made or instituted, or should the said party of the second part at any time or times be careless, indifferent, or conduct himself in such a manner as to injure or prejudice the interests of said party of the first part, or should the said party of the second part become ill or otherwise unfit, from any cause whatever, in the judgment of the said party of the first part, to fulfill in a satisfactory manner the duties which may be required of him by the said party of the first part, then and thereupon, the said party of the first part shall have the right to discipline, suspend or discharge the said party of the second part, as to it the said party of the first part shall seem fit ; and the said party of the first part shall be the sole judge as to the sufficiency of the reason for such said discipline, suspension or discharge."

Other material facts are stated in the opinion.

George H. Townshend, for the plaintiff.

Frank S. Waterhouse, for the defendant.

WALTON, J. The only question is whether upon the plaintiff's evidence alone, no evidence being offered in defense, this action is maintainable. We think it is. The defendants contracted with the plaintiff for his services for six months. The contract is in writing. At the end of three months and a half they discharged him. No reason was given for the discharge. Apparently there was none. The defendants claim that by the

terms of their contract they had a right to discharge him at any time. We think the contract did not give them that right. It reserved to them the right to discharge him if from negligence, or illness, or from any other cause, he became unfit to fulfill the duties required of him, and it reserved to them the right to be the sole judges of the sufficiency of the reason for such discharge. But it did not reserve to them the right to discharge him without a reason. And in judging of the sufficiency of the reason we think the law would require of them the utmost good faith. It would not allow them to give a false reason. It would not allow them to falsely pretend that he was incompetent or inefficient when their real reason was his refusal to submit to a reduction of his compensation. The error of the defendants seems to have been in the assumption that because they had a right to judge of the sufficiency of the reason for his discharge, therefore they had a right to discharge him at their own will and pleasure, and without giving him any reason for so doing. We think the contract will not bear this interpretation. We think that notwithstanding the right of the defendants to judge of the sufficiency of the reason for discharging the plaintiff, that the reason must have been one which, to some extent at least, unfitted him for the discharge of the duties required of him. No such reason is shown to have existed, or to have been adjudged by the defendants to exist; and we think his discharge without the existence, or an adjudication of the existence, of such a reason, was a breach of their contract, and renders them liable to him for some damages. *Sutherland v. Wyer*, 67 Maine, 64.

A default is to be entered, and the damages assessed at nisi prius, as agreed in the report.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

ISRAEL LEAVITT

vs.

INHABITANTS OF SCHOOL DISTRICT No. 19, in Harpswell.

Cumberland. Opinion January 18, 1887.

Real actions. Title acquired during pendency of action. Pleadings. Costs.

If, pending a real action for the recovery of land, the title to the land, and the right of possession, pass from the plaintiff and become vested in the defendant, this fact may be pleaded in bar of the further maintenance of the suit.

It must be specially pleaded in bar of the further prosecution of the suit, and not in bar of the suit generally.

When a plea in bar to the further prosecution of a suit is sustained, the plaintiff will recover his costs up to the time of the filing of the plea; and the defendant his costs subsequently incurred.

ON REPORT.

This is a writ of entry dated November 19th, 1882, to recover a lot of land containing five rods square, situated in School District No. 19. in the town of Harpswell.

It was agreed by the parties that at the time of the commencement of the plaintiff's action, he had a legal title to the lot in question; that prior to the commencement of said action, the defendant school district located a school-house lot on said premises, and erected a school-house thereon.

On the eighth day of April, 1885, the plaintiff moved into said school-house, with his family, and established it as his dwelling house, where they have resided ever since.

At the October term, 1885, the defendants filed the following plea:

"And now said defendants at this day, to wit, on the second day of said term, come and say that the said demandant ought not to have or further maintain his said action against them, because they say that previous to the commencement of this action, the said defendants designated, located, and laid out a school-house lot upon the real estate described in said writ and

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86	510
92	602
78	574
1103	473

declaration, upon which to erect a school-house for said district, and thereafterwards erected a school-house thereon; that by mistake or omission in the proceedings relating thereto, there was a failure to comply with the law relative to the laying out of a school-house lot and appraising the same, whereby such location was rendered invalid; that after the commencement of this action, and since the last continuance thereof, that is to say after the term of court begun and holden on the first Tuesday of April, A. D. 1885, from which term said cause was last continued, to wit, on the second day thereof, and before the present term, written application was made by said school district to the selectmen of said town, to wit, on the thirteenth day of April, A. D. 1885, to have the lot so designated and described re-appraised by them for a school-house lot; that such proceedings were had thereon; that thereafterwards, to wit, on the twenty-fourth day of April, A. D. 1885, said selectmen re-appraised said lot as set out, and affixed a fair value thereon, exclusive of improvements made by said district, and thereafterwards, to wit, on said twenty-fourth day of April, notified said district and the demandant of the sum at which said lot had been appraised, which said sum was thereafterwards, to wit, on the eighth day of May, 1885, tendered by the district to said demandant in payment of said appraisal, whereby said district and the inhabitants thereof, became and are entitled to the lawful and exclusive possession and occupancy of said real estate, so set out and appraised for a school-house lot; and the same became vested in them for said purpose, and the demandant became and is wholly divested of all right to the seizin and possession of same, and this the said defendants are ready to verify.

"Wherefore they pray judgment if the said plaintiff ought further to have or maintain his said action against them."

At the trial, after the admission of the plaintiff's title at the commencement of the action, the defendants offered in evidence the records of the defendants' school district, for the purpose of showing a re-appraisal of the lot as set forth in their plea.

Evidence was also introduced upon the question of tender.

The action was then reported by the consent of the parties for the full court to render such judgment as the law and evidence required.

John J. Perry and *D. A. Meaher*, for plaintiff.

An examination of the authorities will satisfy the court that there is no principle better settled than this: That in a real action, the defendant can not give in evidence an outstanding title acquired by him from a third person after the date of the writ.

The action can be maintained if the demandant has a right of entry at the time of bringing the suit. R. S., c. 104, § 5; see § § 4 and 8.

Justice WILDE, in giving the opinion of the court in *Andrews v. Hooper*, 13 Mass. 471, says: "The tenant can not be permitted to set up a title under a deed made since the commencement of the action. The evidence of a title thus acquired has been, I believe, uniformly rejected in our courts.

Lord ELDENBOROUGH says, in *Le Bret v. Papillon*, 4 East. 502: "It may be considered as a settled rule of pleading that no matter of defense arising after action brought, can properly be pleaded in bar of the action generally."

The court in this state, in *Parlin v. Haynes*, 5 Maine, 178, quote *Andrews v. Hooper*, and squarely endorse the doctrine laid down in that case.

In a subsequent case, *Clark v. Pratt*, 55 Maine, 546, the court say: "If the tenant in a writ of entry, after action brought, purchase of a third person an outstanding title derived from the demandant himself, this can not be pleaded in bar of the action." And in this case, the case of *Parlin v. Haynes* is referred to and reaffirmed.

In another case, *Chick v. Rollins*, 44 Maine, 104, the court say, (it being a complaint for flowage): "The case as now presented, is in the nature of a real action. The issue is touching the title to the premises. It is well established that a title in such actions acquired after the commencement of the suit, can not be allowed to be introduced to defeat the claim of the demandant."

In *Hall v. Bell*, 6 Met. 433, the court say: "To allow a tenant who holds without right at the time of the commencement of a suit, to avoid liability to pay costs, and acquire the right to tax costs, as the prevailing party, by the acquisition of an independent title pending the litigation, might work great injustice."

In *Tainter v. Hemenway*, 7 Cush. 573, the devisee under a will brought a writ to recover the land against one who had no title. It was held that a sale and conveyance duly made by the trustee to the tenant, was no bar to the demandant's recovery.

In *Curtis v. Francis*, 9 Cush. 427, the court say: "If the plaintiff has a good cause of action, when his action is brought the defendant can not defeat it by showing an outstanding title in a stranger, or by procuring a new title to himself after action brought."

Hooper v. Bridgewater, 102 Mass. 512, is a case exactly in point.

It is admitted that the original location of the school-house lot was illegal and void, for the court has so decided. *Leavitt v. Eastman and al.* 77 Maine, 117.

The proceedings must be in strict accordance with the provisions of the statute by virtue of which they were had. *Leavitt v. Eastman*, 77 Maine, 117; *Norton v. Perry and al.* 65 Maine, 183.

Where a school-house lot has been legally designated, and the owner thereof asks an unreasonable price, or refuses to sell, the municipal officers may lay out a lot and appraise the damages, and on payment or tender of damages . . . it may take such lot to be held for the purposes of a school-house lot. Here, a tender is required before a lot can be "taken." R. S., c. 11, § 57; *Storer v. Hobbs*, 52 Maine, 144.

Under the provisions of §§ 59, 60, 61 and 62, of c. 11, R. S., no tender is required. The sum fixed as the value of such lot is to be assessed, collected and paid over, as provided in § 48.

This law of 1873, which authorizes school districts to "appraise" private property to which such district has no lawful title, and

which of itself give no title to such district, is a clear infringement of the vested rights of the owner. It provides that in the appraisal of a school lot, all buildings and improvements, put upon the lot by the district, are to be excluded, and further provides that such improvements enure to the benefit of the district.

It has long been settled law that if a building be erected without the assent and agreement of the land owner, it becomes at once a part of the realty, and is the property of the owner of the freehold. *First Parish v. Jones*, 8 Cush. 184; *Poor v. Oakman*, 104 Mass. 309; *Webster v. Potter*, 105 Mass. 414; *Howard v. Fessenden*, 14 Allen, 128; *Oakman v. Dorchester Ins. Co.* 98 Mass. 57; *Madigan v. McCarthy*, 108 Mass. 376.

P. J. Larrabee and C. W. Goddard, for the defendants, cited upon the question of pleading: *Rowell v. Hayden*, 40 Maine, 582; 1 Chit. Pl. 657-8; 6 Dane's Abr. 30; 5 Bacon's Abr. 477-8; *Yeaton v. Lynn*, 5 Pet. 230; Tyler, Ejectment, 468-9-70; *Stilphen v. Stilphen*, 58 Maine, 508; *Tufts v. Maines*, 51 Maine, 393; *Morgan v. Dyer*, 9 Johns. 255; *Le Bret v. Papillon*, 4 East. 502; *Covell v. Weston*, 20 Johns. 414; *Brown v. Brown*, 48 Am. Dec. 53; *Boyd v. Weeks*, 43 Am. Dec. 749; *Merchants' Bank v. Moore*, 2 Johns. 294.

WALTON, J. The question is whether, if, pending a real action for the recovery of land, the title to the land, and the right of possession, pass from the plaintiff and become vested in the defendant, this fact may be pleaded in bar of the further maintenance of the suit.

Undoubtedly. In *Rowell v. Hayden*, 40 Maine, 582, the court held that where, after the commencement of his suit the plaintiff conveyed the demanded premises to a third person, this fact might be successfully interposed to the further maintenance of the suit. And if such is the law when the title has become vested in a third person, *a fortiori*, such must be the law when the title and the right of possession have become vested in the defendant. Why should the plaintiff recover the possession of land after his right to the possession is extinguished, and it is

certain that he cannot hold it if it is given to him? And why should the defendant be deprived of the possession after he has in a lawful mode become the owner of the land, and entitled to the possession of it? It is believed no good reason can be given.

It is perfectly well settled that such a defence can not be made under the general issue. It must be specially pleaded. And it must not be pleaded in bar of the suit generally. It can be pleaded only in bar of the further prosecution of the suit. The effect then is, not to defeat the suit *ab initio*, but to stay its further prosecution; in which case the plaintiff will recover his costs up to the time of the filing of the plea, and the defendant will recover his costs incurred subsequently. In one sense, such a plea may be said to divide the suit into two actions, in the first of which the plaintiff is the prevailing party and entitled to costs, and in the second of which the defendant is the prevailing party and entitled to costs. This result avoids all supposed hardships, and deals out to both parties even handed justice,—a result devoutly to be wished for in all cases.

Such must be the judgment in this case. The demanded premises have been taken by the defendants for a school-house lot. Pending the suit, they have perfected their title to it. This has been done without the concurrence of the plaintiff; but it has been done under authority of the statutes of the state, and in the performance of a public duty imposed upon the defendants by law; and a title thus acquired is entitled to the same respect and to the same protection as one obtained in any other mode. The evidence satisfies us that the plaintiff has been tendered the appraised value of the lot, and that his right to the possession of it is extinguished. This fact is brought to the attention of the court by a proper plea; and it is the judgment of the court that the suit be no further prosecuted.

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ., concurred.

JOSEPH H. POOR vs. WILLIAM BEATTY and others.

Cumberland. Opinion January 18, 1887.

Fast Day. Poor debtor's bond. Damages. R. S., c. 113, § 40.

Justices to hear a poor debtor's disclosure can not be selected on Fast-day.

In a suit upon a poor debtor's bond where there is no defence, the plaintiff is entitled to recover the amount of his execution, costs and fees of service, with interest, as provided in R. S., c. 113, § 40.

Foss v. Edwards, 47 Maine, 145, overruled.

ON REPORT from superior court.

This was an action of debt on bond, and was submitted on report to the law court on the following agreed statement of facts:

"The bond in suit is dated November 3, 1884, being in the usual form of a poor debtor's bond, given under arrest on execution.

"The writ is dated June 10, 1885, and was entered at the September term, 1885. Ad damnum, three hundred dollars.

"On the twenty-fifth day of March, A. D. 1885, the Governor of Maine, by his proclamation of that date, appointed Thursday, April 23, 1885, as the day of the annual fast, and thereafterwards, on the fourth day of April, 1885, publicly proclaimed the same in the usual manner, by causing said proclamation to be published in the papers of that date.

"On the seventh day of April, 1885, William Beatty, the principal in said bond, notified the plaintiff by citation of that date, in usual form, that he would submit himself to examination and take the oath prescribed in the thirtieth section of chapter 113 of the Revised Statutes, on Thursday, April 23, 1885, at eight o'clock, at the office of J. D. Anderson, at Gray, Maine.

"On said twenty-third day of April, said William Beatty appeared at the time and place aforesaid, and selected a justice to hear his disclosure, that after waiting the usual time for the creditor to appear in person or by attorney to select a second justice, and his failure so to do, a second justice was chosen by an officer duly qualified thereto, and said two justices, chosen

as aforesaid, met and organized on said day for the purpose of hearing the disclosure of said William Beatty, and immediately thereafter adjourned to the next day, Friday, April 24th; that on said twenty-fourth day of April, said justices met in accordance with said adjournment, heard the disclosure of said debtor, and administered to him said oath, and gave him a certificate of discharge in the usual form.

"Under the above statement of facts, the plaintiff claims that said justices had no jurisdiction, that said disclosure is no defence to this suit on the bond, and that he is entitled to judgment, damages to be assessed in the amount of the debt, costs and interest.

"Defence claims that said disclosure is a defence to this suit, and that they are entitled to judgment.

"The law court, to determine the liability of said defendants, if any, and establish the rule of damages, which are to be assessed at *nisi prius* in accordance with said opinion, if defendants are liable."

Frank and Larrabee, for the plaintiff, cited: R. S., c. 77, § 48; *Estes v. Mitchell*, 14 Allen, 156; *Mann v. Mirick*, 11 Allen, 29; *Hackett v. Lane*, 61 Maine, 31; *Perry v. Plunkett*, 74 Maine, 328.

Symonds and Libby, for the defendants.

All the proceedings were regular and in accordance with law, and were a complete performance of one of the conditions of the bond, if it was lawful to make the fifteen days' notice returnable on Fast-day, and for the justices to assemble on Fast-day and then adjourn till the next day to hear and complete the disclosure. We submit that there is nothing in the statutes of this state which prevents a poor debtor from disclosing on Fast-day to save the penalty of his bond, and nothing which prevents the justices from meeting on that day and adjourning the proceeding until the next day. The provision in R. S., c. 77, § 48, does not purport to apply to trial justices or to any proceedings under R. S., c. 113, relating to the disclosure of poor debtors. There is nothing in R. S., c. 83, relating to the proceedings of trial justices in civil actions which forbids their holding court on

Fast-day, and section 18 of that chapter implies that for certain purposes, justices' courts may be open on all days except Sunday, inasmuch as it provides that the appeal must be entered within twenty-four hours after the judgment, Sunday not included. Clearly, this provides for cases in which the court may be open on Fast-day, at least for the purpose of perfecting an appeal. The same is true of R. S., c. 113. Section 5 of that chapter provides that "The justices may adjourn from time to time if they see cause; but no such adjournments shall exceed three days in the whole, exclusive of Sunday." By section 28 of the same chapter, this provision of section 5, as to adjournments, is made applicable to disclosures in cases where bonds have been given like the one in suit in this action. The fair implication from this provision, we think, is that Sunday alone was excluded because on other days, like Fast-day and other legal holidays, the disclosure proceedings might legally go on.

In *Estes v. Mitchell*, 14 Allen, 156, it was held that a magistrate has no jurisdiction to discharge a poor debtor on Fast Day, but that was because there is in the Massachusetts General Statutes a provision analogous to R. S., c. 77, § 48, which is applicable to the proceedings of magistrates in civil cases, while we claim that that section of our statutes has no reference to trial justices.

The defendants claim that the facts stated in the report afford a defence to the action, and that they are entitled to judgment. They moreover claim that in any event the case falls within the provisions of R. S., c. 113, § 69, in which only the real and actual damages are to be assessed. *Foss v. Edwards*, 47 Maine, 145.

WALTON, J. Justices to hear a poor debtor's disclosure can not be selected on Fast-day. Fast-day is classed among the *dies non juridicus*, and no court can be held on that day. If the time fixed for a court falls on Fast-day, the court is to stand adjourned till the next day. R. S., c. 77, § 48. This adjournment takes place by operation of law, and is not to be

made by the court itself. There is to be no court on that day. The statute declares that the next day shall be deemed the first day for all purposes. It is to be deemed the first day for the purpose of selecting the justices and organizing the court, as well as the hearing of the debtor's disclosure. It is quite as important a part of the proceedings. To meet and select the justices on Fast-day, would as clearly constitute an interruption of the proper observance of the day as if the whole proceedings were completed on that day. The presence of the parties or their attorneys would be necessary, and the presence of the magistrates, and perhaps it would be necessary to procure the attendance of an officer. Consultations must be had, notices given, and if the creditor should happen to live a considerable distance from the place appointed for the hearing, his time for the entire day might be consumed by these preliminary proceedings. We think the creditor can not be compelled thus to spend Fast-day. There is no necessity for it. If the time selected for the disclosure happens to fall on Fast-day, the whole proceedings are to stand adjourned till the next day by operation of law; and the next day, in the language of the statute, is to be deemed the first day "for all purposes,"—for the purpose of selecting the justices, as well as the hearing of the disclosure. The disclosure in this case having been had before justices selected on Fast-day, in the absence of the plaintiff, it constitutes no defence to the action; and the plaintiff is entitled to recover the amount of his execution, costs, and fees of service, with interest, as provided in the R. S., c. 113, § 40. The case relied upon by the defendants as establishing a different rule for the assessment of the damages, (*Foss v. Edwards*, 47 Maine, 145,) was expressly overruled in *Hackett v. Lane*, 61 Maine, 31.

*Judgment for plaintiff. Damages
to be assessed at nisi prius.*

PETERS, C. J., VIRGIN, LIBBEY, EMERY and HASKELL, JJ.,
concurring.

In Memoriam.

PROCEEDINGS OF THE CUMBERLAND BAR IN RELATION TO THE DEATH OF

HON. WILLIAM G. BARROWS,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT, FROM MARCH 27, 1863,
TO MARCH 27, 1884, AND WHO DIED AT HIS RESIDENCE IN
BRUNSWICK, APRIL 6, 1886, AGED 65 YEARS.

A meeting of the Cumberland Bar was held in Portland at 2.30 o'clock, on the afternoon of Friday, July 30, 1886, to hear the report of a committee on resolutions, on his death. The resolutions submitted were unanimously adopted. The meeting was then adjourned to the Supreme Judicial Court room, where the law court was in session. PETERS, C. J., and WALTON, VIRGIN, LIBBEY, EMERY and HASKELL, JJ., were present.

S. C. STROUT, Esq., President of the Cumberland Bar Association, rose and said :

May it please the Court,—It has become my painful duty to announce to your Honors, that since your last session in this county WILLIAM G. BARROWS, for many years your associate upon this bench, has deceased.

His character as a man was pure and above reproach; his ability and learning as a lawyer and judge were of that high quality that always commanded the respect and commendation of the bar and the community.

Associated with the eminent judges who have adorned the bench of Maine, he was in all respects their peer; while at the

bar we esteemed and loved him, and his career upon the bench increased our regard.

Simple in his tastes, just and well balanced in mind, warm hearted, but not impulsive, modest almost to a fault, to his own merit,—he was a good judge on whom suitors could safely rely for a fair and impartial determination of their rights, according to law. The members of the bar of Maine, who have known him long and well, will cherish his memory, and our successors will learn to know and appreciate him from his able opinions contained in our reports.

As a fitting tribute to his memory, the bar of this county, in which Judge BARROWS for many years had his home, have adopted appropriate resolutions, and charged Judge CLEAVES with the duty of presenting them to this court, which he will now do.

At the conclusion of Mr. STROUT's remarks Hon. NATHAN CLEAVES, chairman of the committee on resolutions, addressed the court as follows :

May it please your Honors,—The relations which Judge BARROWS sustained for so many years towards the bar of the State and the court over which you are now presiding, render it highly appropriate that you should join with us in paying just public tribute to his memory.

Judge BARROWS was born at Yarmouth, in this county, and in early childhood, upon the decease of his father, was adopted by his uncle, the Rev. Joseph Palmer Fessenden of Bridgton,

“ A man he was to all the country dear,
Remote from towns he ran his godly race,
Nor e'er had changed nor wished to change his place.”

In the quiet picturesque village of South Bridgton, at the modest home of his uncle our deceased brother passed his youth. His preparation for college was largely under the personal instruction of this cultured and eloquent “village preacher” who paid with willing hand the expenses of the college course of his adopted son, who graduated at Bowdoin college in 1839. He pursued his professional studies in Portland, with his uncle,

General Samuel Fessenden, the senior member of the well known firm of Fessenden and Deblois, and was admitted to the bar in 1842. The story of his subsequent life I leave for others to tell in fitting terms, having necessarily, but briefly alluded to it in the memorial which I now have the honor to present.

Judge Cleaves then read the following memorial and resolution :

WILLIAM GRISWOLD BARROWS is dead ; and the members of the Bar of the County of Cumberland with a deep sense of personal bereavement, desire to express in enduring form, their high estimate of his life and labors, and to commend his excellent example to those who follow them.

His natural love of knowledge was quickened and encouraged in his early years by fortunate family and social influences, and he came to the practice of his profession with a mind well grounded in fundamental legal principles, and enriched with the fruits of diligent classical and general study.

In his practice at the bar he acquired an unquestioned reputation for faithfulness, integrity and accurate learning, and gained the confidence and respect of his associates, the courts, and the community in which he lived.

He was elected Judge of Probate for the county of Cumberland in 1856, and most acceptably performed the duties of that office, until 1863, when he was appointed an Associate Justice of the Supreme Judicial Court of the State. For twenty-one years he was a distinguished and honored member of this court.

He brought to the administration of his high judicial trust a sleepless conscience, an absolute rectitude of purpose, an almost intuitive perception of right and wrong, and a resolute determination to apply the principles of law to the rights of men, with unerring justice. As was said of one of the Chief Justices of England, "He seemed to love justice as his life, and the laws as his inheritance, and acted as if he remembered whose image and commission he bore, and to whom he was accountable for the equity of his decrees."

His judicial opinions, extending from volume fifty to volume seventy-seven, of the Maine Reports, are models of sound

judicial thought and judgment, expressed in the choicest and clearest language. They will always be held in high estimation by the jurist, and regarded with admiration by the scholar. *Si monumentum quaeris, circumspice suam vitam et suas labores.*

While the printed reports of this court abundantly attest the fulness of his learning, the correctness of his taste, his eminent ability and untiring patience and industry, his associates and contemporaries will remember the kindness of his heart, his ready sympathy, and faithful friendship, his pure life and Christian virtues, and perpetuate them with grateful admiration, in this brief testimonial of his life and character :

Resolved : That this tribute of respect in memory of our deceased brother, be presented at the law term of the Supreme Judicial court, now in session, at Portland, with a request that the same be entered upon its records.

WESTON THOMPSON, Esq., of Brunswick, of the committee on resolutions, followed Judge CLEAVES with the following remarks :

May it please the Court,—Our common grief has been made easier by the several griefs that we have borne before. Some of us have been so bereft that the treasures of our hope and memory had become the same ; and yet so blest that the heaven of our longing will suffice us, if it but restore what has been given to us here.

When they depart whose presence made us wish that earthly life might never end, voices unheard by our dull sense before begin to say that waiting love shall have its own again. The recollection of past happiness pleads with us then, until ingratitude becomes thanksgiving. Even from distant Galilee comes greeting, "Be of good cheer—it is I."

Therefore, now, to those who have been so afflicted and so consoled, it is cause for exultation as well as for mourning, that our late companion, leal and true—illustrious and long-loved, has left the world. We should be willing to accept his burden that he may be relieved of it ; to do without his presence for a

season, that he may be with those that neither lose, nor mourn, nor say farewell.

It seems quite certain that while he was a member of this court, his days passed pleasantly. He had honest pride in the judicial office. He had not the uneasiness of a political ambition. He must have had that happiness which attends the doing well of any work; with the advantage of his vast and profound learning in the law and beyond it, of his singular skill in the use of language, and in that no man doubted that the righteousness of his intention was without variableness or shadow of turning.

He was of grave and venerable aspect. In his bearing was a suggestion of power. He wore a dignity not assumed with his commission, but that was put upon him by his Maker.

At *nisi prius*, he pursued the case with feline watchfulness; crouching to spring, and forbearing; and on the occasion for his intervention, he was a lion. His reported decisions will show the utmost circumspection; constant regard for public policy, as well as for the rights of parties. Patiently, he analyzed, and weighed, and measured. Thoughtfully, he looked ahead to see how any precedent might be abused.

In his own opinions, which came from much consideration, he had confidence; but he also had such respect for the judgment of others that he never seemed to doubt the merit of democratic institutions. He was always deeply interested in public affairs; but however disappointed by the art of the demagogue whom he heartily despised, or by the dullness of the victims of that art, he always insisted with apparently full confidence, that the determination of the majority would be ultimately just.

He was by nature self-reliant, and a stranger to fear. His allegiance was to justice, and not to power. He did not quail in the presence of a majority. He was willing to be alone for conscience's sake. His standard of righteousness was not the actual doing of any man or of any party. He judged by rule; not as the world judged. He was of strong affections; but his scorn of evil doing was so intense, and his power of expression

was so great that unsound men were not easy in his company, and all hypocrites were afraid of him.

Yet though as judge and citizen, he would not compromise with evil, he had compassion for all but penal suffering, and often even for that; womanly gentleness and sympathy which those who met him only in the ways of public business, did not often see. In his house was a most generous hospitality. Sad to say, there was no child there; but he had that delight in the company of children which men of great learning often, if not usually show; and strange as it may seem to some, they recognized him as their fit companion.

When his worldly task was done, and it was no more good that he should be in pain, a shadow came upon him, and he ceased to hear the din of our life; but when every other sound was lost in silence, he still heard and knew one voice—the one most welcome among all the voices of the earth. So, for him, even while he was yet among us, love had survived sorrow. And in the shadow, where haply, the peace of God was brooding, he went away.

To this place, where we have been wont to meet him, from which he is now absent forever and ever, we of the Cumberland bar, united by the memory of so many of the mighty and true hearted that have gone, and now yet more strongly bound together for his sake, have come with these already fading garlands, our last and all.

We that have seen him and are so soon to die, would gladly leave such tribute here that he might be endeared to after times as he has been to ours. We understand the vanity of that desire. We do not know in what distant age his personality, and even his now splendid fame may be forgotten; but we believe the influence of his life will even then abide, strength to the heavy laden and inspiration to those who may not know from what pure source it came, "until the day of Jesus Christ."

Hon. JOSEPH W. SYMONDS, also one of the committee on resolutions, then spoke as follows:

The universal regret, with which Judge BARROWS' retirement

from the bench was received, was followed only too quickly by the deeper regret, equally universal in this state, upon the announcement of his death. That he should have insisted upon withdrawing, at the period of the fullest maturity and vigor of his mental powers, from his chosen field of judicial labor, for which he was especially fitted, and where his long experience gave peculiar value to his services, was at the time the subject, I might almost say, of wonder as well as of regret. It seemed strange that he should have reached such a decision; and the conviction arose in many minds that he must have in view some literary work, historical or otherwise, to which he preferred to devote the leisure of his later years, and that, in putting off the robes of his profession, he was only to reap the harvest which, with his scholarly tastes and habits, he had planted in other fields than those of the law.

But in the light of the later event, we can seem to trace a connection, undisclosed before, between his retirement from the bench and his suddenly succeeding illness and death. We find ourselves inclined to believe—I know not whether it may be true or not, but one inclines to believe—that some word of premonition of the future, which others did not heed, had already fallen upon his own ear, that some shadow of the impending change was even then stretching closely along his path, and that when he left the bench he may have known, what we could not believe, that there was before him in this world only the quickly gathering darkness.

He had given his life to the service of the state; it was at best but a brief respite at evening that he reserved for himself; he had given his life to the state, and few men come bringing to their native state a costlier offering than a life and service like his. After years at the bar, after the period of valuable services rendered in the discharge of the delicate and responsible duties of judge of probate in this county, after twenty-one years of arduous labor upon the supreme bench, it is not strange that it seemed good to him to withdraw from the cares and distractions of his profession to the calmness of contemplation and the companionship of his books.

He had acted well his part. As a judge at *nisi prius*, he had made the most constant and exacting demand upon himself in his attention to the details of controverted cases. Many men in this state who hold their exact legal rights, neither more nor less, as the result of complicated and difficult investigations, owe them to the painstaking and self-sacrificing efforts of Judge BARROWS, to his vigilance that waked, in court and out, during the trial of cases before him, and to his patience that never flagged. As one of the law judges of the state, for more than a score of years, with simple diligence and fidelity, with exact and regulated method, with sustained and disciplined energy, with the application of all his learning and ability, he devoted himself to his work; and this remains, the record of his life, the monument to his memory, a fair page in the history of this honored court. He has made his work as a jurist a part of the institutions and laws which he helped to mould to more and more perfect form, permanent as the golden legacy which he has left to the state of severe discussion, exact reasoning, delicate illustration and application of legal principles to the ordinary affairs of life. His judicial opinions are the clear result of thorough reading and study, long and mature reflection, and impartial judgment. They show at once the fine mind and the full mastery of the subject.

He wrote with facility and clearness, and with the scholar's pen, and adds his own name as an authority for the close relation between law and literature, for which from Cicero and Pliny to our own day we have many precedents. His style was suited to his subject, and there were no careless lines. He worked in the spirit of the saying of DeQuincey's, that in writing we can not distinguish between matter and manner, between style and substance, that neither of them is capable of a separate insulation, and that one might as well attempt to say, with regard to the earliest rays of the dawn, "how much of the beauty lay in the heavenly light which chased away the darkness, how much in the rosy color which that light entangled."

There is another peculiarity of Judge BARROWS' opinions. They seem to me in many respects to present a perfect picture

of the man himself. There is a distinct flavor of his own personality in them. Not only is this true of the general tone of thought and reasoning, but often one meets a single sentence which is a striking expression of himself. Measured and slow as he was in his movements and in his style of speaking, sure as he was to keep the balance of his mind, he was still a man of the quickest sensibilities, and strong and intense in his feelings. He hated a sham or pretence, and was shy of a legal technicality or fiction, unless he could make it serve the present demands of justice. I am not sure that he was wholly in sympathy with all the tendencies of our institutions and our society. He was thoroughly conservative. He liked the old times, when men were content to do less, and to do it better; to follow a single pursuit which quietly and without ostentation absorbed a lifetime, if only it left a lasting result; to write a sentence that the world would remember, rather than a volume to excite or amuse the idle caprice of the hour; and one need not go beyond his own opinions to find severe strictures upon the arrogance and conceit of our own times. But he did not carry this feeling to excess. He worked well, he did his best, where he was. He was clear and calm in deliberation, true and strong at every post of duty. No man ever faced a difficulty or danger more fearlessly than he, or was more inflexible when he believed he was right.

The last resting place of Judge BARROWS is in the old burying ground at Brunswick, where the inscriptions upon the tombs bear many names that have not perished, and that will not soon perish, from recollection; presidents and professors of the college, whose lives were among the purest and strongest influences in the history of our state; Governor Dunlap, whose dignified presence in old age is remembered by men now in middle life, and is preserved in the monument to his memory by the sculptor, Franklin Simmons; Benjamin Orr, to whom when he died at the age of fifty-six, Chief Justice MELLETT referred as confessedly at the head of our profession in Maine, whose reputation as a great lawyer seems hardly diminished by the lapse of the fifty years and more since he died; with those less widely known, once the neighbors and friends of Judge BARROWS,

or bound to him by yet closer ties. Not long ago, happening to be at this cemetery, I asked a stranger standing just within the gate if he could direct me to Judge BARROWS' grave. He took me there. "Ah, that was a good man," said he, as he passed on and left me standing alone. Reverent footsteps approach his grave, for he was admired and loved at his own home.

There, among the honored dead, in the midst of the scenes with which so much of his life was associated, in the long shadows of the pines, within the sound of the beautiful Androscoggin river where it dashes over its last falls and widens to approach the sea, he sleeps in death. Peace, good-will and grateful remembrances follow him, to guard his repose.

But here in the court his influence lingers and will remain. Year by year, generation after generation, may I not say age after age, the judicial opinions which he elaborated with so minute and patient care, into which he put so much of his energy and his life, will remain among the influences which give color to professional thought and feeling, which direct the course of judicial decision, determine the difficult boundaries of private rights, shape legislation and affect the administration of public affairs. And when the present generation, with its love and respect for him personally, with its warmth of affection for him as a man, shall have passed away, when his fame shall have become impersonal, resting only on his works which remain, when the written page shall be the only witness left that can speak of him as he was, then is it not safe to say, he will be remembered and known as one of the ablest, truest and best among the judges of Maine?

At the conclusion of Judge SYMONDS' remarks Chief Justice PETERS, in behalf of the court, made the following response:

Gentlemen of the Bar,—We cheerfully lay aside our labors for the hour, to join with the bar in paying a tribute of respect to the memory of our late associate, Judge BARROWS. We cordially concur in the sentiments of the resolutions offered by you, and in the eulogies pronounced. The faculties, attainments

and public services of our late friend have been fully and fitly portrayed in what has been already spoken. Still, it would be an omission, if we did not, even at the risk of repetition, give some expression of our own feelings and sentiments on this impressive and interesting occasion.

The deceased was known to most of the present members of the court only while he was a judge. I remember seeing him but once engaged in trying a cause as an advocate. But it is easy for us to apprehend, from our knowledge of the man, how excellently he must have performed all the duties resting upon him in that capacity. We can readily appreciate that industry and promptitude, those indispensable qualities for professional success, personal independence and self-reliance, full and careful preparation, directness, earnestness and force were among his marked qualities while he was at the bar. It would be unlike him to have wasted his own time or words or the time of the court.

Undoubtedly, his career, on the bench, having been a member of this court for twenty-one years, ensures to his name the greater and more enduring fame. This field of labor was probably more fitted to his taste and abilities than was that of the bar. Before coming to this bench he had for quite a period been a judge of probate, filling the position with great satisfaction to the community, his experience in that department rendering him always influential with his associates in questions of probate law.

His fitness and excellence were conspicuous both as a *missi prius* judge, and a member of the court of law. He was a model judge at the trial terms. All his work there was carefully, deliberately, patiently, fully done, with nothing slighted or neglected. Lord HALE said of the duties of judges, that "A jury should be told where the main question or knot of the business lies." Judge BARROWS had the faculty to compass that end. In the trial of every case he fully surveyed the whole field of fact, and gave well prepared and careful rulings on the law. He made his work as perfect as circumstances permitted. If the facts of a case were complicated or confused, "the Gordian

knot he would unloose," often with singular knack and felicity. The consequence was that his terms were laborious, exhaustive, of considerable duration, and the results of them just and satisfactory. I think all would concur with Judge BARROWS in the theory entertained by him, that a case is not fairly tried merely because no exceptionable rulings are given and the facts are not trespassed upon by the court. He believed that the points of a case should be illuminated by all the light which the facts can afford, and that a jury should be made to understand and appreciate them. Too often it is otherwise.

The amount of *nisi prius* work which must have been accomplished by Judge BARROWS may be appreciated when we remember that there were assigned to him not less than six terms upon an average annually, during a period of twenty-one years, — and never a day lost by his sickness.

"To do that which before us lies in daily life
Is the prime wisdom,"

says the poet-philosopher.

And how uneventful of historical record, such an arduous judicial experience necessarily must be, an endless chain sort of employment, the work of one day so much like that of any other. The labors and responsibilities of such a public servant are appreciated but by the few. Even though the world grants him a good name, his good acts are mostly soon forgotten.

"The good that men do is oft interred with their bones," ejaculated Mark Antony deplorably, and half-truthfully, over the body of Cæsar; but a more inspiring sentiment should animate the motives of judges and lawyers. There is a consolation in the reflection that the judicial, or professional zeal and industry, may be, should be, expended for the public good. Faithful work is to be done at the rear as well as at the front of the battles of life. Judges are silent, but can be effective workers in the fields constantly cultivated for the welfare of society. Their good works survive them.

"The seeds they sow are sacred seeds,
And bear their righteous fruits for general weal,
When sleeps the husbandman."

Judge BARROWS himself expresses a satisfactory appreciation of the sentiment in his remarks upon the judicial life of another late associate, Judge DICKERSON, when he said : " But this much we know full well. When a man has faithfully sought to do that which is right, and to improve the talents God gave him, for the benefit of his kind, there remaineth about his memory a fame as well as a fragrance that no amount of success in the accumulation of the riches, so eagerly sought by most men of to-day, can ever give."

Judge BARROWS will be best known to his history in another department of judicial labor. The opinions of the court prepared by him will be his enduring monument, his best eulogy. Here, too, did he give most unsparring pains to the work belonging to his hands, really seeming not to possess the capacity to neglect anything. His quiet energy and perseverance, a machinery that worked noiselessly and without friction or chafe, conquered all tasks. He thoroughly investigated all questions, both of law and fact, whether pertaining to cases in the first instance assigned to him, or to cases previously examined by other judges. His associates felt a relief of responsibility after his examinations, knowing that no fact, however blindly embraced in the record of the case, would escape his discovery, and that all questions involved had been exhaustively considered.

His opinions are models of literary neatness, clothed in chaste and classical expression, finely finished, scholarly productions. In what he spoke as well as in what he wrote there was good style and taste. His opinions are notable for their ability, those of the greater importance being replete with legal thought and learning, and strong and sound in argument. Although possessed of quick perceptions, his mind seemed to do its work calmly, with steadiness and accuracy, nothing leaving his hands until he had mastered and moulded it according to his own understanding.

Having constructed his judicial work so carefully, he was quite tenacious that it should stand against any objection from his associates. His matured judgment was not easily affected by the opinion of other men either in or out of the consultation

room. He would hardly have agreed with Burke, that he who calls in the aid of an equal understanding doubles his own; nor would he very much appreciate the remark of Pope, that a man who is convinced that his former opinion was wrong is merely wiser to-day than he was yesterday. He was however, aware of his rather uncompromising tendency in this respect, and for that reason cautiously endeavored to restrain himself from ever forming or expressing any opinion hastily. That he was rarely in error would be the testimony of all his associates.

Perhaps Judge BARROWS would not be considered as having so much of what may be called worldly experience as many public men possess. He had not so much respect as many have for that educator. He was not greatly disposed to deal with any questions upon grounds of expediency. He was too busy with books to be much absorbed in the world's daily affairs. Not that his attention was given to the law exclusively, by any means. For a lifetime his reading took a wide range into the modern and ancient classics, and he found delight in the treatises of the oldest writers. He esteemed it a very valuable privilege that the favor was accorded him of inspecting the old paper materials brought to the paper mills at Brunswick, and occasionally, by the diligence of his search of such materials, he rescued from the manufacturer's destruction some rare and valuable pamphlet or book. His much reading gave scope and quality to his mind.

His moral endowments were a marked element in his character. He possessed that strong moral power which comes from honesty and integrity in all things—in thought, word and deed. He abhorred fraud intensely, and every semblance of it, in whatever guise presented. Mere conventional honesty, such as the world might accept as satisfactory, would fall below his standard. This disposition might have been even of too sensitive and suspecting a nature, having an undue influence upon his views and feelings, were it not that its excessive exercise was greatly restrained by other faculties in the combination of character,—his kindness and benevolence, his fine sympathies, easily touched, and his profound regard for justice and truth.

Judge BARROWS, although retiring in his manners, was a companionable man with those who were companions to him. He possessed the power of sarcasm and more often flavored it with pleasantry and wit. He was agreeable in conversation. It was a talent. He would occasionally tell a story, and always with effect; it would be a hit. His letters to his associates would sometimes bubble with pungent fun. He was quick to see ludicrous things. He was bright and keen in all ways.

He left the bench in 1884, at the end of a third term, (although pressed by the executive to accept a renewal of his commission,) with the deep regret of the bench and bar, and of the people generally. The fears of an insidious disease advancing upon him, unseen by others, not unknown to himself, induced the act. After his term of office was ended, he several times wrote me that he very much desired to see the members of the court together again. On June 8, 1884, he wrote me a letter from which I quote: "Perhaps the fates will let me look in on you in Portland. But, however it may be, my constant feeling towards the court will be, *benedictum sit in nomine domini*. I have enjoyed my leisure thus far very much when the ailments that have been creeping upon me for the last two or three years have permitted, and I hope I am on the mending hand. Any way I shall be clear of the worry I should experience if obliged to feel that somebody else had to do the work that belonged to me. I am glad to think that so long as I held on I never lost a day in court on account of sickness, and always got through the work assigned me, after a fashion. I am content to leave it now in younger hands and hope they will be better paid, both 'in praise and pudding,' for their labors." He came to see us, not until our last law term here, a year ago; and it was a last interview for most of us. The memory of it can not be but sad.

The public and private life of our departed brother, as a whole, furnishes a record such as is rarely attained. It was an industrious, useful, honest and honorable life—to the end. He will always be affectionately remembered by his judicial associates. His virtues and his services as a judge will be long remembered and appreciated by the bench and the bar, and by the people.

His future fame will be that he was a benefactor of his state.

It is a sorrowful duty, in this family meeting of bench and bar, called to pay last honors to the memory of their beloved friend, to utter the final benediction of farewell.

The clerk will enter the resolutions upon the records of the court, and in further respect for the memory of the deceased the court will now be, for the day, adjourned.

I N D E X .

ABATEMENT.

Matter in abatement, whether by plea or motion, must be pleaded in a trial justice's court before a general continuance of the action.

Otis v. Ellis, 75.

ACCOUNT ANNEXED.

See PLEADING, 7.

ACTION.

See EXECUTOR AND ADMINISTRATOR, 1. INSURANCE, (LIFE) 3.

AD DAMNUM.

1. The Supreme Judicial Court has jurisdiction in an action of assumpsit, when the *ad damnum* is more than twenty dollars, though the cause of action set out in the declaration is a promissory note for twelve dollars.

Cole v. Hayes, 539.

2. The *ad damnum* in the writ is the "debt or damages demanded," within the meaning of R. S., c. 83, § 3, which gives trial justices exclusive jurisdiction "when the debt or damages demanded do not exceed twenty dollars." *Ib.*

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMINISTRATOR DE BONIS NON.

See EXECUTOR AND ADMINISTRATOR, 1.

AFFIDAVIT.

See ARREST, 1.

AFFIRMATION.

The magistrate's certificate that the complainant in a criminal prosecution affirmed to the truth of the complaint, conclusively implies that he was conscientiously scrupulous of taking an oath, and he was, therefore, permitted to affirm, and that he affirmed in the form prescribed by the statute.

State v. Adams, 486.

AGENCY.

1. An agent who has authority to contract for the sale of chattels, has authority to collect pay for them at the time, or as a part of the same transaction, in the absence of any prohibition known to the purchaser.

Trainer v. Morrison, 160.

2. Knowledge of this prohibition may be inferred from the circumstances of sale, or from customary usages of trade known to the parties. *Ib.*
3. Persons dealing with an agent have a right to presume that his agency is general, and not limited, and notice of the limited authority must be brought to their knowledge before they are bound to regard it. *Ib.*
4. The notice of the limited authority of the agent, in this case, printed at the top of the bill accompanying the goods sold and not seen by the purchasers, is not so prominent as to hold them at fault in not observing it. *Ib.*

See TOWN AGENT.

AID TO OFFICER.

See REPLEVIN, 2.

ALABAMA CLAIM.

1. Money received upon a judgment of the court of commissioners of Alabama claims, by an administrator, becomes assets in his hands to be administered and distributed by him, as a part of his intestate's estate; and when the same is distributed to an executor of a deceased heir of such intestate, it becomes assets in the hands of such executor, to be administered by him according to the will of his testator. *Grant v. Bodwell*, 460.
2. By the residuary clause of her will, a testatrix gave her son "all the residue and remainder of my estate, real, personal and mixed, wherever found and however situated." *Held*: That this passed to the son, a sum recovered from an Alabama claim by a claimant's administrator and distributed to the executor of such will. *Ib.*

ALIBI.

An *alibi* is not a conclusive answer to an indictment unless the respondent proves himself to have been at so great a distance as to render it impossible that he should have participated.

State v. Fenlason, 495.

AMENDMENT.

1. A warrant for search and seizure under § 40, c. 27, R. S., relating to intoxicating liquors, served by a constable of the county legally authorized to serve such process, but to whom no direction has been given in the warrant, is legally amendable at any time before final judgment, under § 57 of said chapter, the omission of such direction being only matter of form.

State v. Hall, 37.

2. An amendment inserting such direction being but matter of form, is within the power, as well as the discretion, of the court until final judgment. *Ib.*

See ERROR, 5. LEVY, 2. PLEADING, 1, 2.

ANNUITY.

1. Where real estate is devised upon condition that the devisee shall pay an annuity to a certain church, the annuity becomes a charge upon the estate devised; and it will be enforced in equity by a sale of the estate.

Merritt v. Bucknam, 504.

2. When such a charge upon real estate is enforced by a sale of the estate, the costs and expenses of sale, the amount of all annuities due and unpaid with interest and a sum sufficient to produce the annuity in the future will be taken from the proceeds of sale, and the residue paid to the devisee or his grantee.

Ib.

See ASSETS, 3, 4.

APPEAL.

1. An appeal does not lie to the Supreme Judicial Court from a decree, by the court of insolvency, allowing a discharge to an insolvent who has made a composition settlement with his creditors, even though one cause of appeal be that the judge below refused to compel the insolvent to undergo an examination concerning his property at the request of creditors dissatisfied with the settlement.

Ex parte Morgan, 36.

2. Appealing from the decision of a matter in abatement before the general issue is pleaded, is a waiver of any defense under that issue.

Otis v. Ellis, 75.

3. No appeal lies to the county commissioners of York county, from the refusal of the city council of the city of Biddeford to locate and lay out a city street.

Biddeford v. Co. Com. 105.

4. The requirement of R. S., c. 18, § 5, that "if no notice of appeal is presented or pending" at the term of the county commissioners held next after the filing of their return, "the proceedings shall be closed," etc., are modified by § 48, to the extent that when a party has appealed from the decision on location after it has been placed on file and before the next term of the Supreme Judicial Court, "all further proceedings before the commissioners shall be stayed until the decision is made by the appellate court."

Boston & Maine R. R. Co. v. Co. Com. 169.

5. The requirements of R. S., c. 18, § 5, relating to the time within which an appeal is to be taken by any person aggrieved at the estimate of damages by the county commissioners, are applicable only when no appeal on location has been taken. *Ib.*
6. When an appeal is taken from the decision of the county commissioners to lay out a way and prosecuted as provided in R. S., c. 18, §§ 48, 49, the appellant on damages may file notice of appeal within sixty days after final decision in favor of such way. *Ib.*
7. The phrase "within the time above limited" in R. S., c. 18, § 8, refers, when an appeal on location has been taken, to the time limited in § 47 of that chapter. *Ib.*
8. In an appeal from a decree of the probate court, allowing a will, to the Supreme Court of Probate, the whole subject of the allowance of costs is in the discretion of the court. In such case with a final decree in the Supreme Court of Probate sustaining the will without allowing costs, no costs can be recovered. Such a decree, silent as to costs, bars the recovery of costs as effectually as an affirmative decree disallowing them.
Alvord v. Stone, 296.
9. An appeal lies to the action of the county commissioners, under the private act of 1873, c. 375.
Cole v. Co. Com. 532.
10. When such an appeal has been taken from the adverse decision of the commissioners upon a petition asking them to lay out a highway from Commercial street "down said Portland pier to the end of said pier and into tide waters a sufficient distance to give a sufficient depth of water," the committee, appointed by the appellate court, do not exceed the powers conferred upon them by law, when they report that the judgment of the commissioners should be wholly reversed, and "that common convenience and necessity do require the location of said highway and ferry landing on Portland pier, in the city of Portland, as prayed for in said petition." *Ib.*

AQUEDUCT.

See WATERS, 8, 14.

ARBITRATION AND AWARD.

The award of an arbitrator, after stating his conclusion, contained the following clause. "In arriving at this result I have excluded every claim (including those for intoxicating liquors) submitted by said parties, except the following which I have allowed." Then follows a detailed statement of articles allowed each against the other, with the balance struck: *Held*, that the meaning of the award is, not that the arbitrator did not pass judgment upon all the claims submitted, but that he disallowed certain ones which the award declares he "excluded."
Hammond v. Deehan, 399.

See REFEREE.

ARREST.

To justify the arrest on mesne process of one of the joint debtors, the affidavit need not contain the pronoun in the singular form, the plural form is sufficient. *McNamara v. Garrity*, 418.

ARREST OF JUDGMENT.

See PRACTICE, (LAW) 1.

ARSON.

Evidence of threats to burn the same building, the respondent is charged in the indictment with burning, is admissible. *State v. Fenslason*, 495.

ASSESSMENT.

See INSURANCE, (LIFE) 8, 9, 10.

ASSESSOR.

See TAX, 4.

ASSETS.

1. When the possibility of a failure of sufficient assets to meet the legacies named by a testator in his will has not been anticipated and specifically provided for by him, the presumption of intended equality prevails between general legatees, as well as equality in respect to the share to be borne in all deficiencies of assets. *Emery v. Batchelder*, 233.
2. In the administration of testamentary assets where there is a deficiency of such assets after the payment of debts, expenses and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general. *Ib.*
3. Annuities stand upon the same footing as legacies. *Ib.*
4. Between annuitants and legatees there is no priority merely because one is an annuitant and the other a legatee where the estate is deficient, but both must abate proportionally. *Ib.*
5. In the investment of trust funds, trustees are to conduct themselves faithfully and in the exercise of a sound discretion, not with a view to speculation, but rather to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested. *Ib.*

6. Money received upon a judgment of the court of commissioners of Alabama claims, by an administrator, becomes assets in his hands to be administered and distributed by him, as a part of his intestate's estate; and when the same is distributed to an executor of a deceased heir of such intestate, it becomes assets in the hands of such executor, to be administered by him according to the will of his testator. *Grant v. Bodwell*, 460.

ASSIGNEE.

See BANKRUPTCY, 1, 2.

ASSIGNMENT.

See DOWER, 3.

ASSUMPSIT.

See PLEDGE, 3. SUPREME JUDICIAL COURT, 2.

ATTACHMENT.

1. An attachment upon a writ containing a count for money had and received, without a specification of claim, creates no lien upon real estate. When the truth of a return of a levy upon execution is not denied, the same may be amended by the officer, who made it, by signing the same; but ordinarily, by saving the rights of innocent purchasers. *Briggs v. Hodgdon*, 514.
2. When an attorney at law is employed, to sue a debt, attach real estate, procure a judgment, and levy the same upon the land attached, he is forever estopped from denying the validity of his own work, to his own profit or advantage. When the attachment and levy that he was called upon to make are defective, and he purchases the land levied upon, the title that he takes, at once enures to the judgment creditor, and he is estopped to deny the judgment creditor's title to the land. *Id.*

See LIEN, 1, 2. RECORD, 1. REPLEVIN, 1.

ATTORNEY AT LAW.

1. When an attorney at law is employed, to sue a debt, attach real estate, procure a judgment, and levy the same upon the land attached, he is forever estopped from denying the validity of his own work, to his own upon profit or advantage. When the attachment and levy that he was called upon to make are defective, and he purchases the land levied upon, the title that he takes, at once enures to the judgment creditor, and he is estopped to deny the judgment creditor's title to the land. *Briggs v. Hodgdon*, 514.

2. A record that discloses the relation of attorney and client, touching a levy upon real estate, is notice to subsequent purchasers from the attorney, that he cannot dispute the validity of the levy, and take an after-acquired title to the land levied upon, in his own right. Ib.

AUDITOR.

By R. S., c 82, § 71, an auditor's report is made admissible in evidence.

Phippsburg v. Dickinson, 457.

BANKRUPTCY.

1. *It seems* that the assignee of a bankrupt is not bound to take possession of all property conveyed by the bankrupt in fraud of the bankrupt law. *Nash v. Simpson*, 142.
2. He may elect to take it or not to take it. If he does not elect to take it within a reasonable time, it is deemed an election to reject it. Ib.

BARK.

See PUBLIC LAND, 1.

BATH, ASSESSORS OF.

An assessor of the city of Bath was elected and qualified in 1880 for three years. In 1883 he was re-elected, but it was denied that he was qualified. In 1884, he resigned and was re-elected for two years, to fill the vacancy, and was duly qualified. *Held*,

1. That if he was not qualified under the 1883 election, he would hold over under his previous election, and that his acts as assessor during that year were valid.

2. That his resignation and re-election in 1884 were legal.

Bath v. Reed, 276.

BID.

See CONTRACT, 2.

BIDDEFORD, CITY COUNCIL OF.

See WAY, 10.

BILLS AND NOTES.

See PROMISSORY NOTE.

BOND.

1. A declaration on a guardian's bond, which omits the averment, that the interest of the persons suing had been specifically ascertained by probate decree, may be amended by adding the omitted words.

McFadden v. Hewett, 24.

2. A guardian's bond is not converted from a statutory to a common law bond merely because it contains provisions not required in the statutory form, which are in accordance with law. *Id.*
3. The plaintiff conveyed by warranty deed to the defendant a parcel of land bordering upon Penobscot Bay, the southerly boundary of which, as stated in the deed, was "to a stake and stones on the shore of Penobscot Bay, thence southwesterly by said shore to the extremity of Squam Point, so called," etc. A third party had a right of fishery, by prior deed, in the waters on that side of defendant's land, with all privileges necessary for carrying on the same, and which was not mentioned in the deed from the plaintiff to the defendant. An action of trespass had been brought by such third party against the defendant and judgment recovered, but damages had not been assessed or execution issued. The defendant represented to the plaintiff that by reason of the covenants contained in his deed, the plaintiff was liable to pay whatever judgment and costs should be recovered against the defendant in the trespass suit, and the plaintiff thereupon executed a bond to the defendant for the payment of the same. Upon a bill in equity brought to cancel said bond, *Held*: That such representations would not warrant a court of equity in cancelling said bond. *Abbott v. Treat, 121.*

See COLLECTOR OF TAXES, 1. CONTRACT, 3. EXECUTOR AND
ADMINISTRATOR, 1. MORTGAGE, 3, 4. POOR DEBTOR'S
DISCLOSURE, 6.

BRICK.

See LIEN, 3.

BURDEN OF PROOF.

1. It is settled law in this state that, in an action against a town to recover damages for the death of a person alleged to have been caused by the negligence of the town in not keeping one of its ways in repair, the burden of proof is upon the plaintiff to show due care on the part of the deceased. *Merrill v. North Yarmouth, 201.*
2. Where the settlement of a pauper is in dispute, and a prior settlement is admitted to have been in the defendant town, the burden is upon the defendant to show that the pauper has gained a settlement elsewhere by a residence of five successive years without receiving supplies, directly or indirectly, as a pauper. *Etna v. Brewer, 377.*

See NEGLIGENCE, 9, 10.

CASES EXAMINED, ETC.

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|---|------------------------------|
| 1. <i>State v. Rounds</i> , 76 Maine, 123, affirmed. | <i>Rounds v. State</i> , 42. |
| 2. <i>Foss v. Edwards</i> , 47 Maine, 145, overruled. | <i>Poor v. Beaty</i> , 581. |

CHARGE TO THE JURY.

See PRESIDING JUSTICE, 1.

CHATTEL MORTGAGE.

See MORTGAGE (CHATTEL).

CITATION.

See PRACTICE (LAW), 9.

CITIZENS' MUTUAL RELIEF SOCIETY.

See INSURANCE (LIFE), 4.

COLLECTOR OF TAXES.

The same person was collector of taxes in a town for three years in succession, when there appeared a deficiency in his accounts. There was no evidence showing the time when the deficit commenced, or when it occurred, or of any appropriation of payments by him to the town, either by the collector or the town. He gave a bond each year. *Held*: That the deficit should be divided between the three bonds in the proportion of the sums collected by the collector on each commitment *Phipsburg v. Dickinson*, 457.

COMMERCIAL TRAVELER.

See AGENCY, 1-4.

COMMISSIONER.

See CUMBERLAND COUNTY COMMISSIONERS. *WAYS*, 10.

COMMITTEE.

See CONTRACT, 4.

COMPLAINT.

1. A complaint founded on R. S., c. 27, § 48 as amended by St. 1885, c. 366, § 6. simply alleging the name of the town in which the defendant was intoxicated and disturbing the public peace, is not sufficient on demurrer.
State v. McLoon, 420.
2. The magistrate's certificate that the complainant in a criminal prosecution affirmed to the truth of the complaint, conclusively implies that he was conscientiously scrupulous of taking an oath, and he was, therefore, permitted to affirm, and that he affirmed in the form prescribed by the statute.
State v. Adams, 486.
3. To convict a person for violating any of the provisions of Priv. and Spec. L. of 1885, c. 463, enacted for the protection of bass in Winnegance Creek, it need not be shown that the notices described in Pub. L. of 1885, c. 262, were posted, the latter provision having no application to the former. *Ib.*
4. A complaint against one for using nets without the prescribed attachments thereto, in Winnegance Creek, need not allege the owner's name. *Ib.*
5. A complaint under Priv. and Spec. L. of 1885, c. 463, sufficiently setting out an unlawful using of the kind of net forbidden by § 3, and also alleging the illegal killing of bass under § 5, is not bad for duplicity, the latter allegation being in the nature of an aggravation of the former offence. And when no venue is laid for the latter it may be rejected as surplusage. *Ib.*
6. A complaint properly setting out the offence of using a net of the kind forbidden by § 3, is valid, although it alleges the forfeiture in the future tense. *Ib.*

See INDICTMENT, 14.

COMPOSITION.

See INSOLVENT LAW, 1.

CONDITION.

See CONTRACT, 3.

CONSIDERATION.

See PROMISSORY NOTE, 2.

CONSTITUTIONAL LAW.

1. It is not an unconstitutional exercise of legislative power to require a railroad corporation to build and maintain highway crossings laid out over its track, so far as such crossings are within its located limits, although the law imposing such burden was enacted since the railroad was built, the company being subject to the general laws of the state in existence when its charter was granted and such as should be thereafter passed.
Portland & Rochester R. R. Co. v. Deering, 61.
2. The act of 1873, c. 375, which provides in section 1, "That the county commissioners of the county of Cumberland, on petition of one hundred or more citizens of said county, be and hereby are authorized and empowered to locate a public highway in the city of Portland, extending into tide waters of sufficient depth, with a good and substantial ferry way, . . .

with the right to take private property therefor, in like manner and effect as in locating other highways in said county," is constitutional.

Cole v. Co. Com. 532.

CONTRACT.

1. A verbal contract that the plaintiff should labor for a manufacturer at two dollars and twenty-five cents per day, commencing Monday, September 1st, but for no stipulated period, is defeasible at the will of either party, and a telegraph company is liable, for nominal damages only, in not delivering a telegram to the plaintiff, seasonably notifying him of the terms of the contract, whereby he lost all benefit from it.

Merrill v. Western Union Tel. Co. 97.

2. A mere bid in answer to an advertisement for proposals for building does not constitute a contract. *Howard v. Maine Industrial School for Girls*, 230.
3. A conditional acceptance, such as requiring a bond, delays the completion of the contract until the condition is complied with. *Ib.*
4. Where one party, as a corporation, acts through a building committee, a majority of the committee must concur in making any contract, or in varying one already made. *Ib.*
5. An agreement acknowledging the possession of personal property claimed by another and promising to "keep said property free of expense" to the other, "and to deliver to him on demand such . . . as I admit to be" his property, and to keep the balance "until such time as the question of title is settled," will not prevent such other person from maintaining trover for the same after demand and refusal. *Buck v. Rich*, 431.
6. Equity will not decree specific performance of an agreement when the evidence is conflicting and the agreement itself is unreasonable.

Higgins v. Butler, 520.

7. A contract for employment provided that if the employee failed to comply with the agreements or rules of certain base ball clubs, or became careless or indifferent, or conducted himself in such a manner as to injure the employer, or became ill or otherwise unfit from any cause whatever, in the judgment of the employer, to fulfill in a satisfactory manner his duties, then the employer should have the right to discipline, suspend or discharge him, and should be the sole judge of the sufficiency of the reason for so doing. *Held*, that his discharge without the existence, or an adjudication of the existence of a reason, and without alleging any reason, was a breach of the contract.

Winship v. Portland League Base Ball and Athletic Association, 571.

See LIEN, 3. PARTNERSHIP, 1.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1-4.

CORPORAL PUNISHMENT.

See SCHOOL-MASTER.

CORPORATION.

1. It is the duty of a director to know the financial condition of his corpora-

tion, and he cannot avail himself of any dereliction of such duty to secure a personal advantage over other creditors of the corporation.

Clay v. Towle, 86.

2. The plea of general issue admits the plaintiff's corporate existence and power to sue. *Rockland, Mt. Desert and Sullivan Steamboat Co. v. Sewall*, 167.
3. A subscriber to stock in a corporation, who never took any part in the organization of the corporation, can not be held upon his subscription, when it does not appear that the whole capital named in such subscription agreement, was subscribed. *Ib.*
4. The fact that a judgment creditor of a corporation took out execution and made seizure and sale thereon of the personal property of the corporation in part satisfaction thereof, does not prejudice his case in an action to collect the balance of his judgment against a shareholder who has not paid for his stock. *Grindle v. Stone*, 176.
5. In an action on a judgment debt of a corporation against Henry N. Stone of Boston, a shareholder therein, the certificate of organization was signed by Henry N. Stone of Boston. *Held*, that the defendant is the same person who signed the certificate of organization is *prima facie* shown by the identity of name, in the absence of any evidence of another person of that name in Boston. *Ib.*
6. In an action by a judgment creditor of a corporation against a stockholder who has not fully paid for his stock, the plaintiff must bring the case within the provisions of R. S., c. 46, §§ 46, 47, by showing: (1) That he has a lawful and *bona fide* judgment against the corporation "based upon a claim in tort or contract, or for any penalty" recovered within two years next prior to the commencement of this action; (2) that the defendant subscribed for or agreed to take stock in the corporation and has not paid for the same as payment is defined in § 45; (3) that the cause of action against the corporation accrued during the defendant's ownership of such unpaid stock; (4) that the proceedings to obtain the judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the corporation books. *Ib.*
7. The certificate of organization of a corporation showing that one shareholder took thirteen thousand three hundred and thirty-two and one-third shares of the capital stock of the par value of five dollars, that one hundred thousand shares issued in all and the amount paid in by the stockholders was one thousand dollars in money and ten thousand dollars in land, is *prima facie* proof that such shareholder had not paid in full for his stock, in the absence of any evidence to the contrary. *Ib.*
8. Where one party, as a corporation, acts through a building committee, a majority of the committee must concur in making any contract, or in varying one already made. *Howard v. Maine Industrial School for Girls*, 230.
9. A promissory note reciting "we" promise to pay, and signed "D. P. Livermore, Treas'r Hallowell Gas Light Co.," is the note of the individual and not of the corporation. *McClure v. Livermore*, 391.
10. An action on such a note against the corporation, and its default, will not estop the owner from maintaining an action against the individual when it

does not appear that the acts of the plaintiff caused the defendant to change his position, or to take some action injurious to himself. *Ib.*

See EQUITY, 7. MORTGAGE, 1.

COSTS.

1. In an appeal from a decree of the probate court, allowing a will, to the Supreme Court of Probate, the whole subject of the allowance of costs is in the discretion of the court. In such case with a final decree in the Supreme Court of Probate sustaining the will without allowing costs, no costs can be recovered. Such a decree, silent as to costs, bars the recovery of costs as effectually as an affirmative decree disallowing them.

Alvord v. Stone, 296.

2. The statutory rule that the prevailing party recovers cost, does not apply to a controversy between the plaintiff in a trustee action and a claimant of the fund trusted; costs in such a matter may be awarded as in equity; it is substantially an equitable proceeding.

White v. Kilgore, 323.

3. When a plea in bar to the further prosecution of a suit is sustained, the plaintiff will recover his costs up to the time of the filing of the plea; and the defendant his costs subsequently incurred.

Leavitt v. School District in Harpswell, 574.

See PRACTICE, (LAW) 10. REFEREE, 4.

CO-TENANT.

See DOWER, 1.

COURTS OF OTHER STATES.

See JURISDICTION. PLEADING, 8.

CUMBERLAND COUNTY COMMISSIONERS.

1. All reports which the commissioners of Cumberland county are required to make at a "regular session" must be made at a "term of record" holden on the first Tuesday of January or June, and all continuances required by law are to be to the next "term of record." *Harpswell v. Co. Com.* 100.
2. The words "regular session" in R. S., c. 78, § 6, are not identical in meaning with the same words in R. S., c. 18, § 5. *Ib.*
3. The act of 1873, c. 375, which provides in section 1, "That the county commissioners of the county of Cumberland, on petition of one hundred or more citizens of said county, be and hereby are authorized and empowered to locate a public highway in the city of Portland, extending into tide waters of sufficient depth, with a good and substantial ferry way, . . . with the right to take private property therefor, in like manner and effect as in locating other highways in said county," is constitutional.

Cole v. Co. Com. 532.

4. The authority of the commissioners under that act, is not confined and limited to one petition, when the action thereon was adverse. *Ib.*
5. The doctrine of *res judicata* does not apply to the action and judgment of county commissioners in locating highways. *Ib.*
6. An appeal lies to the action of the county commissioners, under the act of 1873, c. 375. *Ib.*

7. When such an appeal has been taken from the adverse decision of the commissioners upon a petition asking them to lay out a highway from Commercial street "down said Portland pier to the end of said pier and into tide waters a sufficient distance to give a sufficient depth of water," the committee, appointed by the appellate court, do not exceed the powers conferred upon them by law, when they report that the judgment of the commissioners should be wholly reversed, and "that common convenience and necessity do require the location of said highway and ferry landing on Portland pier, in the city of Portland, as prayed for in said petition." *Ib.*

DAMAGES.

1. One partner agreed in writing to sell to a co-partner his interest in the company's property, the property consisting of a store and stock of goods (furniture) therein, and some other personal property, the whole worth about twenty-five thousand dollars, the sale to be at cost for most of the property, the balance to be taken at an appraisal if the parties could not agree on its value, the terms of the sale to be cash on delivery, and either party who should break the contract was to forfeit to the other the sum of five hundred dollars.

Held: That the five hundred dollars were intended by the parties to be liquidated damages. *Maxwell v. Allen*, 32.

2. Damages are not recoverable, by a railroad company against a town which has laid out ways over its track, for the interference and inconvenience occasioned to its business by the opening of the new ways, nor for any increased risks or increased expense in running its trains caused thereby.

Portland & Rochester R. R. Co. v. Deering, 61.

3. A verbal contract that the plaintiff should labor for a manufacturer at two dollars and twenty-five cents per day, commencing Monday, September 1st, but for no stipulated period, is defeasible at the will of either party, and a telegraph company is liable, for nominal damages only, in not delivering a telegram to the plaintiff, seasonably notifying him of the terms of the contract, whereby he lost all benefit from it.

Merrill v. Western Union Tel. Co. 97.

4. Where one deliberately and without compulsion selects a particular portion of a floatable stream for the storage of logs, and thereby prevents another from entering such common highway with a drive of logs from a tributary stream, he is liable to such other person for the damages occasioned thereby.

McPheters v. Moose River Log Driving Co. 329.

5. Wages and board of men while waiting for a reasonable time would be an element of damage; so too, would the expense of moving one crew out and another in, as well as the increased cost, if any, of making the drive the next season, and the interest on the contract price for making the drive during such time as the payment thereof was delayed, because of inability to complete the drive on account of such obstruction. *Ib.*

6. The loss of supplies left in the woods for use when completing the drive, and destroyed by wild beasts, would not constitute an element of damage. *Ib.*

7. Facts stated upon which it was determined by the court that a verdict of \$1,450, (which is to be doubled) was not excessive in an action by a young girl, under R. S., c. 30, § 1, against the owner of a dog by which she was bitten.
Fitzgerald v. Dobson, 539.
8. In such a case it is not error: (1) to exclude a question to a physician "if he thought there would be any difficulty, in the hands of a good physician in having" the plaintiff "walk in a reasonable time;" (2) to admit testimony that the same dog had previously attacked and bitten another girl; (3) to admit the testimony of a physician, of his observation of another case where paralysis resulted from injury; (4) to exclude a hypothetical question on cross-examination of a physician when the facts supposed had not, at that time, appeared in any testimony; (5) to refuse to instruct the jury, "that the plaintiff can not recover damages, except those caused by the bite of a dog, because nothing else is declared on."
Ib.

See EMINENT DOMAIN, 3. PLEDGE, 5. RAILROAD, 14, 15. SHADE TREE, 3. WATERS, 15. WAY, 6.

DECLARATION.

See ERROR, 5. PLEADING, 1, 4, 6, 7.

DEEDS.

1. A deed containing the words "Excepting the roads laid out over said land," conveys the fee within the limits of the road, subject to the easement of the public incident to the uses of the way.
Wellman v. Dickey, 29.
2. When a plan has been made to delineate an actual survey upon the surface of the earth, and a deed describes the lot by its number "according to the plan," the actual survey rather than the plan fixes the location and boundaries of the lot.
Bean v. Bachelder, 184.
3. Where a party has in fact signed and executed a deed by a name which he has seen fit to adopt, although not the correct name of such party, he will nevertheless be estopped from taking advantage of it.
Davis v. Callahan, 313.
4. Such act will be binding not only on such party, but on all others in privity with him, and whose rights are not paramount thereto.
Ib.
5. In a real action the plaintiff, *Melissa A. Andrews*, claimed title under a deed from her deceased husband running to *Mercy A. Andrews*. The court instructed the jury as follows: "Now was the deed made to her and delivered to her as her deed? She has it and produces it here, and the presumption, therefore, is that it was delivered to her." *Held*, error.
Andrews v. Dyer, 427.
6. A deed from the State Land Agent, under Stat. 1832, c. 30, containing a stipulation that when the purchase money is paid "then this is to be a good and sufficient deed to convey said lots, otherwise to be null and void, and said lots to be and remain the property of said state," does not convey the legal title.
Stratton v. Cole, 553.
7. The title in such a case remains in the state until the payment of the purchase money; and an extension of the time of payment does not operate to pass any title.
Ib.

See BOND, 3. EQUITY, 1. LEASE, 1.

DEER.

See INDICTMENT, 15.

DEFECTIVE MACHINERY.

See MASTER AND SERVANT, 1, 2.

DEFICIT.

See COLLECTOR OF TAXES, 1.

DEMAND.

See DOWER, 1, 2. TROVER, 2, 3.

DEPOSITION.

See EXECUTOR AND ADMINISTRATOR, 11.

DEVISE.

See ANNUITY, 1. WILLS, 3.

DIRECTOR.

See CORPORATION, 1.

DISTRIBUTION OF PERSONAL ESTATE.

1. Personal estate of an intestate for distribution among his heirs, descends to those living at the time of his death; and the decree of distribution should name each one of such heirs and his share, and if any have died in the meantime, the share of each one so deceased should be decreed to be paid to the executor or administrator of such deceased heir. *Grant v. Bodwell*, 460.

DIVISION FENCE.

See FENCE, 1, 2.

DIVORCE.

1. In order to enable a divorced wife to maintain against her former husband an action of dower in an undivided lot of real estate, it is not necessary that her demand for dower should be made upon the co-tenants of her husband. *Williams v. Williams*, 82.
2. Courts of other states have no authority to decree a divorce between citizens of this state. *Gregory v. Gregory*, 187.
3. The courts of this state are not bound by the findings of courts of other states upon the jurisdictional question of residence of the parties. *Ib.*
4. "Extreme cruelty," as the third cause for divorce in the act of 1883, means "personal violence," intentionally inflicted, so serious as to endanger "life, limb or health," or to create reasonable apprehension of such danger. *Holyoke v. Holyoke*, 404.
5. Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, either body or mind, endangers "life, limb or health," and constitutes "cruel and abusive treatment," the sixth cause for divorce in that act. *Ib.*
6. The false charge of infidelity is not legal cruelty, but in a given case, may be proved to so operate. *Ib.*

7. The averment in a libel for divorce, that the conduct specifically charged impaired, or seriously threatened to impair health, is sufficient on general demurrer, without particularly stating how the health was impaired. *Ib.*
8. The court is not authorized to grant a divorce for "utter desertion" when there is only a refusal of marital intercourse. *Stewart v. Stewart*, 348.

DOG.

1. Facts stated upon which it was determined by the court that a verdict of \$1,450, (which is to be doubled) was not excessive in an action by a young girl, under R. S., c. 30, § 1, against the owner of a dog by which she was bitten. *Fitzgerald v. Dobson*, 559.
2. In such a case it is not error: (1) to exclude a question to a physician "if he thought there would be any difficulty, in the hands of a good physician in having" the plaintiff "walk in a reasonable time;" (2) to admit testimony that the same dog had previously attacked and bitten another girl; (3) to admit the testimony of a physician, of his observation of another case where paralysis resulted from injury; (4) to exclude a hypothetical question on cross-examination of a physician when the facts supposed had not, at that time, appeared in any testimony; (5) to refuse to instruct the jury, "that the plaintiff can not recover damages, except those caused by the bite of a dog, because nothing else is declared on." *Ib.*

DONATIO CAUSA MORTIS.

See GIFT, 1.

DOWER.

1. In order to enable a divorced wife to maintain against her former husband an action of dower in an undivided lot of real estate, it is not necessary that her demand for dower should be made upon the co-tenants of her husband. *Williams v. Williams*, 82.
2. A demand for dower is not vitiated because it embraced more land than was claimed in the demandant's writ in her action of dower. *Ib.*
3. The demandant's husband held lands by descent from his father whose widow was entitled to dower therein. After the demandant's action of dower as a divorced wife was commenced, the widow applied to the probate court to have her dower assigned. In proceedings duly had, her dower in all lands was set out and assigned to her in one of the parcels, without objection by her or by the heirs, and the assignment was accepted by the judge of probate. *Held*, that the assignment was valid and binding on the parties, and that it defeated the demandant's right to dower in that parcel. *Ib.*

See MORTGAGE, 6.

DRUNKENNESS.

See COMPLAINT, 1.

DURESS.

1. Mere threats of criminal prosecution, when no warrant had been issued nor proceedings commenced, do not constitute duress. *Higgins v. Brown*, 473.
2. It is not duress for one who believes that he has been wronged to threaten

the wrong doer with a civil suit. And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution.

Hilborn v. Bucknam, 483.

EASEMENTS.

1. An easement originating from water supplied by a spring not situated upon land belonging to the grantor of the plaintiff's premises, will not pass as an appurtenance to the estate conveyed, unless it has become attached to the same. *Dority v. Dunning*, 381.
2. But where such easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee. *Ib.*
3. Easements growing out of it may be acquired by grant or prescription, and thus become the objects of title in others. *Ib.*
4. An easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right. *Ib.*
5. But in order that the unity of title shall operate to extinguish an existing easement, the ownership of the two estates must be coextensive, equal in validity, quality, and all other circumstances of right. *Ib.*
6. If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of such easement. *Ib.*

EMINENT DOMAIN.

1. Private property may be taken by the sovereign power of the government in the exercise of the right of eminent domain for purposes of public utility. *Hamor v. Bar Harbor Water Co.* 127.
2. Interests in water, as well as in land, may be taken by virtue of this power, and both are equally the subjects of compensation. *Ib.*
3. It is a well established rule, that where damage is necessarily done to the property of an individual by being taken by authority of the legislature for public use, such damage can be recovered only in the manner authorized by statute. *Ib.*
4. To constitute a legal taking however, by which those acts which cause the damage can be justified, and thereby remit the party to such exclusive statutory remedy, it must be shown that the requirements of law have been strictly complied with. *Ib.*
5. In all cases where private property is taken in the exercise of the right of eminent domain, whether it be in lands, or the usufructuary interest in flowing water, the taking must be evidenced by some writing describing the estate so taken by definite and specific boundaries, quantity or measure, according to the nature of the property taken. *Ib.*

EQUITY.

1. Complainants sold to defendant an ice house privilege worth, besides betterments on it, about one thousand dollars for fifty dollars; defendant's agent represented to owners that the property had been sold for taxes, and he thought it could not be regained, that there were no buildings on it, and

that it was valueless; there were buildings on it, but not belonging to the land, and there was a tax-title upon it, though not valid; the defendant recovered the land under the deed from complainants by a litigation costing them more than half the value of the land, and was obliged to purchase the betterments; the father of all the complainants but one, (his widow,) and the title was inherited from him, had for nearly twenty years, to their knowledge, abandoned the property, receiving no rents nor paying taxes; complainants could have visited the property in a day, and could have inquired about it at any time by telegraphic communication; another person had approached them to sell the property; and they were some days deliberating before a sale was made to the defendant.

Held, in a bill in equity brought to cancel the deed because of the alleged fraud, that the representations, excepting the statement that there were no buildings on the land, being unaccompanied by any circumstance or fact, were merely expressions of opinion concerning the property.

Held further, that it is not satisfactorily proved that the complainants were induced by the defendant's representations to sell the property; they sold upon their own knowledge of the property and its situation, being unwilling to attempt to rescue the property through an uncertain and costly law suit.

Carlton v. Rockport Ice Co. 49.

2. In equity, a finding is not set aside for the improper rejection or reception of testimony, if the full court decides upon the whole facts that the verdict or decree below is satisfactory. *Ib.*

3. The plaintiff conveyed by warranty deed to the defendant a parcel of land bordering upon Penobscot Bay, the southerly boundary of which, as stated in the deed, was "to a stake and stones on the shore of Penobscot Bay, thence southwesterly by said shore to the extremity of Squam Point, so called," etc. A third party had a right of fishery, by prior deed, in the waters on that side of defendant's land, with all privileges necessary for carrying on the same, and which was not mentioned in the deed from the plaintiff to the defendant. An action of trespass had been brought by such third party against the defendant and judgment recovered, but damages had not been assessed or execution issued. The defendant represented to the plaintiff that by reason of the covenants contained in his deed, the plaintiff was liable to pay whatever judgment and costs should be recovered against the defendant in the trespass suit, and the plaintiff thereupon executed a bond to the defendant for the payment of the same. Upon a bill in equity brought to cancel said bond, *Held*: That such representations would not warrant a court of equity in cancelling said bond. *Abbott v. Treat*, 121.

4. It is a rule applicable alike in courts of equity as well as in courts of law, that fraud is not to be presumed, but must be established by proof. *Ib.*

5. A representation of what the law will or will not permit to be done, will not ordinarily amount to such fraud as a court of equity will take cognizance of, but is to be regarded rather as the expression of an opinion than the assertion of a fact. *Ib.*

6. Circumstances stated in the opinion which will warrant holding the bill to allow the complainant opportunity to establish his legal title. The defendant may dispute the complainant's legal title which the latter has conveyed away, though the former does not claim under it. *Nash v. Simpson*, 142.

7. The plaintiffs, four in number, and the defendants, thirteen in number, are members of an unincorporated joint-stock company; the property of the company at the commencement of the suit consisted of a building, a small amount of furniture and eighty-two dollars in money, in all of the value of about eleven hundred dollars; the stock was divided into ten-dollar shares, of which the plaintiffs owned twelve shares and the defendants the balance; the building was erected for the use of the Patrons of Husbandry, of which all the defendants are members, and the plaintiffs had been members. *Held*, that equity does not require that a receiver should be appointed to sell the property and divide the proceeds among the members of the company.
Hinkley v. Blethen, 221.
8. Where the surety on a mortgage debt pays the same to the holder and receives the note and mortgage, without any assignment or discharge written thereon, he can not maintain a bill in equity against the owners of the equity of redemption, praying, that the mortgage "may be decreed to be still subsisting, that he may be subrogated to the rights of the mortgagee therein and may be empowered to foreclose the same according to law."
Lynn v. Richardson, 367.
9. Equity will not decree specific performance of an agreement when the evidence is conflicting and the agreement itself is unreasonable.
Higgins v. Butler, 520.
10. The Supreme Judicial Court, as a court of equity, has supervisory rather than concurrent jurisdiction with the insolvent court; and it will not order an assignee to declare and pay a dividend until application has first been made to the insolvent court.
Bird v. Cleveland, 524.
11. A voluntary association holding a fund of two thousand dollars, contributed by its members and divided into shares of twenty dollars each, for which certificates were issued, used the fund in repairing and furnishing a hall to be used as an Odd Fellows' Hall. *Held*, that equity would not, at the suit of the owners of three shares, compel the others to purchase those shares, or submit to have the furniture removed and sold and the proceeds divided, while the hall was being used as an Odd Fellows' Hall, though by a different lodge.
Robbins v. Waldo Lodge, I. O. O. F. 565.

See ANNUITY, 1. EXECUTOR AND ADMINISTRATOR, 4.

INSURANCE (LIFE), 2. MORTGAGE, 1.

ERROR.

1. Writs of error lie only for the correction of such defects as are apparent from inspection of the record, a transcript of which should be produced at the trial.
Tyler v. Erskine, 91.
2. A party, desiring to reverse a judgment for error, should require the clerk to complete and attest his record, that he may produce a transcript of it at the trial, and until this is done such party is not entitled to relief by writ of error.
Ib.
3. Writs of error for errors in law lie only for defects apparent upon the face of the record.
Lewiston Steam Mill Co. v. Merrill, 107.
4. If there be error in law that would appear from an extended record, that either party desires to avail himself of upon a writ of error, he should before

trial, require the clerk to make an extended record of the judgment sought to be reversed, (and if he refuses so to do, procure an order from the court directing such record to be made), and then present a transcript of such extended record, that the court may know from inspection of it whether an error exists. *Ib.*

5. Defects in a declaration that are proper subjects of amendment are cured by default and cannot be reached by writ of error. *Ib.*

6. A record that recites a command in the writ for the officer to attach certain specified logs upon which a lien is claimed, and the return of the officer that he did attach the same and put his mark upon them, and that, within five days thereafter, he filed in the clerk's office of the town where the logs lay the usual copy of his attachment, is sufficient to sustain a judgment *in rem* against the logs. *Ib.*

ESTOPPEL.

See ATTORNEY AT LAW, 1. DEED, 3-4. PROMISSORY NOTE, 4.

EVIDENCE.

1. It is admissible for witnesses, who have competent judgment and understand the elements of the question, to testify to their opinion of the damages sustained by a railroad corporation for having a highway located over its track. *Portland & Rochester R. R. Co. v. Deering*, 61.

2. The return of the proper officer upon an execution for costs, that he has demanded payment of it from the indorser of the original writ who neglected to pay the same, or to show personal property sufficient to satisfy the same, is conclusive evidence of the liability of the indorser in an action on the case against him, under R. S., c. 81, § 7. *Chesley v. Perry*, 164.

3. In an action on a judgment debt of a corporation against Henry N. Stone of Boston, a shareholder therein, the certificate of organization was signed by Henry N. Stone of Boston. *Held*, that the defendant is the same person who signed the certificate of organization is *prima facie* shown by the identity of name, in the absence of any evidence of another person of that name in Boston. *Grindle v. Stone*, 176.

4. The certificate of organization of a corporation showing that one shareholder took thirteen thousand three hundred and thirty-two and one-third shares of the capital stock of the par value of five dollars, that one hundred thousand shares issued in all and the amount paid in by the stockholders was one thousand dollars in money and ten thousand dollars in land, is *prima facie* proof that such shareholder had not paid in full for his stock, in the absence of any evidence to the contrary. *Ib.*

5. Whether the evidence of the loss or destruction of a paper is sufficient to let in secondary evidence of its contents, is a question addressed to the discretionary power of the presiding judge. *Camden v. Belgrade*, 204.

6. To let in oral evidence of the contents of a lost paper, it is sufficient if the witness can state the substance of its contents. *Ib.*

7. A paper found in the possession of one of the parties to an alleged marriage, or produced by such party, purporting to be a marriage certificate, is admissible in proof of marriage, in civil cases other than actions for

- seduction, without proof of its genuineness, or that it was given by one acting in an official capacity. *Ib.*
8. In proof of a disputed marriage in civil suits, (other than actions for seduction) cohabitation, reputation, the declarations of the parties, written or oral, and their conduct, and all other circumstances usually attending the marriage relation and indicative of its existence, are admissible in evidence; and where there is shown to have been cohabitation for some years and children born to the parties, it is admissible to show what kind of a family the woman had previously belonged to and what kind of a home she had left. *Ib.*
9. A motion for a new trial on the ground of newly discovered evidence will not be granted if the evidence in support of it is not taken within the time ordered by the court. *Ib.*
10. Evidence of a declaration of a son of one of the parties, made in the presence and hearing of his father, who remained silent, was admitted against objections, and the jury were instructed that it was for them to determine what significance they would attach to it. *Held*, no error.
Johnson v. Day, 224.
11. In order to sustain an exception to a ruling excluding a conversation, the exceptions must disclose what the conversation was. *Ib.*
12. An expert may give his reasons for his opinion in his examination in chief as well as the opinion itself.
Leviston Steam Mill Co. v. Androscoggin Water Power Co. 274.
13. A tax was assessed against the "administrators of the estate of R," when the representative parties were executors and not administrators. *Held*, that this was not a fatal mistake, it being fairly within the scope of R. S., c. 6, § 142; and that parole evidence was admissible to show that the executors were the individuals intended to be taxed. *Bath v. Reed*, 276.
14. The judgment of two justices of the peace and quorum, who hear a debtor's disclosure, having jurisdiction, can not be contradicted, as between the parties, upon any point judicially determined by them, except as by R. S., c. 113, § 69. *Cannon v. Seveno*, 307.
15. When the justices adjudicate, as appears by their record, that it does not appear from the debtor's disclosure that he had in his possession any account against any one, the record is conclusive and can not be contradicted by the debtor's disclosure, signed and sworn to by him. *Ib.*
16. In an action against an individual for injuries sustained on account of defects or improper obstructions made by the defendant in a way, evidence is not admissible to prove that other persons passed safely over the alleged defect. *Branch v. Libbey*, 321.
17. C obtained a certificate of life insurance from the United Order of the Golden Cross, which provided that the sum insured should be paid to H at C's death. That was done. *Held*, in an action by C's executor against H, that evidence was admissible to prove the defendant promised C, that, after deducting whatever sum might be due him from C, at C's death, from the insurance money, he would pay the balance over to C's heirs. *Held further*, that C's executor was the proper party to bring suit on such a promise.
Catland v. Hoyt, 355.

18. In a suit by one town against another to recover the expenses of examination, commitment and support of an insane person in the insane hospital, where it appears that the municipal officers had the evidence and certificate of the two examining physicians before them upon which to base their proceedings of commitment, and the certificate of commitment and of the physicians is introduced and received in evidence without objection, the verdict will not be set aside on the ground that the evidence fails to show that the municipal officers kept a record of their doings as required by R. S., c. 143, § 13.

Etna v. Brewer, 377.

19. The question of residence is in part one of intention. *Ib.*
 20. Declarations accompanying the act of leaving a town where a person's residence is, expressing the object and purpose of making a home in another town, or of performing acts indicating a change of residence from that town, are admissible in evidence on the question of intention. *Ib.*
 21. They accompany an act, the nature, object or motive of which is a proper subject of inquiry, and as such, are a part of the *res gestae*. *Ib.*
 22. Testimony may be excluded as immaterial when its sole office is to strengthen or give credit to other testimony, such other testimony being legally inadmissible. *Buck v. Rich*, 431.
 23. By R. S., c. 82, § 71, an auditor's report is made admissible in evidence.

Phippsburg v. Dickinson, 457.

24. Entries of partial payments in the hand-writing of a deceased partner, in the firm books, are not admissible in evidence as proof of payments, for the purpose of removing the bar of the statute of limitations, in an action by the firm to recover the balance of the account. *Libby v. Barton*, 492.
 25. Evidence of threats to burn the same building, the respondent is charged in the indictment with burning, is admissible. *State v. Fenlason*, 595.
 26. Where the defendant in a suit in equity is made a party as heir of the plaintiff's deceased wife, the plaintiff is thereby rendered incompetent as a witness by the provisions of R. S., c. 82, § 98. *Higgins v. Butler*, 521.

See DAMAGES, 8. EMINENT DOMAIN, 4, 5. NEGLIGENCE, 9, 10. PLAN, 1.

PLEADING, 11. PRESIDING JUSTICE, 1.

EXCEPTION.

1. In order to sustain an exception to a ruling excluding a conversation, the exceptions must disclose what the conversation was. *Johnson v. Day*, 224.
 2. An error must affirmatively appear in order to sustain an exception; it can not be assumed. *Ib.*
 3. Exceptions will not be sustained to the admission of evidence which was so immaterial that it could do the excepting party no harm. *Bath v. Reed*, 276.
 4. When objections to the report of referees are based upon facts outside the record, the alleged facts must be proved to the court to sustain the objections to the report. Exceptions to the ruling of the court upon such objections must show that the alleged facts were proved. *Nutter v. Taylor*, 425.

See PLEADING, 10.

EXECUTOR AND ADMINISTRATOR.

1. An administrator *de bonis non* is officially interested in his predecessor's bond to the extent of the unadministered assets; and he may originate a suit on it, provided his interest has been specifically ascertained; otherwise he must have authority from the judge of probate to bring the action and can not rely therefor on an authorization given to another person. In either case he must allege such facts in the writ as will authorize him to bring and maintain the action. *Waterman v. Dockray*, 139.
2. When one named as executor in a will, after the decease of the testator, and before the probate of the will and his appointment and qualification as executor, pays to a legatee a legacy given him by the will, the probate of the will and appointment and qualification of the executor relate back by construction to the death of the testator, and validate the payment. The legatee no longer has any legal claim for the legacy. *Pinkham v. Grant*, 158.
3. A testator in his will authorized the executor to make such conveyances and disposition of his estate, as should, in the opinion of the executor, be necessary to carry into effect the provisions of the will. *Held*, that such a power vests in the executor an authority to sell, limited only by his own judgment of what is necessary to carry into effect the provisions of the will, and by necessary implication it also vests in him the legal title. *Hanson v. Brewer*, 195.
4. Equity can not lend its aid to an effort knowingly and intentionally made to discourage and prevent purchasers from completing their purchases of such an executor. *Id.*
5. By the terms of a life insurance policy, the insurance company promised to pay the assured, his executors, administrators or assigns, for the sole use and benefit of his four children therein named, and the survivor or survivors of them, the amount expressed in the policy, after deducting therefrom any indebtedness the company might have on account of the contract, within ninety days after notice and proof of death. *Held*:
 1. That the insurance, although for the sole use and benefit of the children, was payable, not to them, but by the express terms of the contract, to his own legal representative, who upon payment of the insurance would become a trustee under an express trust of the money thus collected for the *cestuis que trust*.
 2. That the administrator of the assured was the only proper party who could maintain an action at law upon the contract, the policy having never been assigned, and the assured having died intestate.
 3. That the insurance company, before payment over to the administrator of the amount due upon said policy, is not liable in trustee process at the suit of a creditor of one of the children named in the policy. *Phinney v. Union Mut. Life Ins. Co.* 244.
6. Where an owner of land conveyed to another a mill and a limited water supply therefor, the conveyance restricting the grantee's right of flowage over the grantor's other land to an extent that would ensue from a dam, at the mill, only four feet high, such grantee is not thereby debarred from attempting to

obtain a higher flowage under the flowage act; and, for raising the head of water higher than the deed prescribes, the grantor's remedy in the first instance is under the flowage act, and not by suit at common law.

Plummer v. Doughty, 341.

7. The interest and title of a mortgagee in real estate, upon his decease, vests as assets in his executor or administrator, who is the proper party to any proceeding for the foreclosure of the mortgage. *Ib.*
8. Where suit is brought to foreclose a mortgage, on account of a breach thereof, given to secure a bond for the support of a husband and wife during their natural lives, a breach of such bond must be shown, but such breach need not be shown to have occurred during the lifetime of the husband who died first. *Ib.*
9. If there has been a breach of the bond since the death of the husband and before the commencement of the suit, it is sufficient to maintain the action. *Ib.*
10. Nor is it necessary, to entitle a recovery in such case, to show that any claim had been made by the widow for her support, on the administrator of the deceased mortgagor, before suit was commenced. *Ib.*
11. The deposition of a defendant is not admissible where the plaintiff is an executor. *Buck v. Rich*, 431.
12. An executor can be shown to be a nominal party by the probate records only, in an action of trover by him to recover the value of certain personal property belonging to the estate. *Ib.*
13. Personal estate of an intestate for distribution among his heirs, descends to those living at the time of his death; and the decree of distribution should name each one of such heirs and his share, and if any have died in the meantime, the share of each one so deceased should be decreed to be paid to the executor or administrator of such deceased heir.

Grant v. Bodwell, 460.

See ALABAMA CLAIM, 1, 2. EVIDENCE, 17. INSURANCE, (LIFE) 2. TAXES, 5.

EXEMPLARY DAMAGES,

See SHADE TREES, 3.

EXPERT TESTIMONY.

An expert may give his reasons for his opinion in his examination in chief as well as the opinion itself.

Lewiston Steam Mill Co. v. Androscoggin Water Power Co. 274.

FALSE IMPRISONMENT.

An action against a sheriff for false imprisonment, by the act of a deputy, must be brought within two years after the cause of action accrues.

Trask v. Wadsworth, 336.

FALSE REPRESENTATION.

Where a wife is injured by a vicious horse, which was sold to her husband as a kind animal and good family horse, she has no remedy for her injury against the seller, because of his false representations to the husband, when

It does not appear that the seller understood that the horse was being purchased for the wife, or for her use, or that he expected the wife to rely upon any representations of his to her husband.

Carter v. Harden, 528.

See BOND, 3. EQUITY, 1.

FAST-DAY.

Justices to hear a poor debtor's disclosure can not be selected on Fast-day.

Poor v. Beatty, 580.

FELLOW-SERVANT.

See MASTER AND SERVANT, 3.

FENCE.

1. The remedy provided by R. S., c. 22, § 6, in relation to division fences, is penal as well as remedial, and will not be extended by implication to cases not clearly embraced within the provisions of the statute.

Cobb v. Corbitt, 242.

2. To entitle a recovery of "double the value and expenses" of building that portion of a division fence assigned by fence viewers to the party who neglects to build the same, it must appear that the party seeking such recovery has built the whole of the part thus assigned.

Ib.

FIRE.

See RAILROAD, 14.

FIRE DEPARTMENT.

1. The officers of the fire department of a municipality are public officers, and not the mere servants or agents of the municipality.

Burrill v. Augusta, 118.

2. A city is not liable for the act of the officers of its fire department, unless made so by express statute, or unless the act complained of was expressly ordered by the city government.

Ib.

FISHING.

1. To convict a person for violating any of the provisions of Priv. and Spec. L. of 1885, c. 463, enacted for the protection of bass in Winnegance Creek, it need not be shown that the notices described in Pub. L. of 1885, c. 262, were posted, the latter provision having no application to the former.

State v. Adams, 486.

2. A complaint against one for using nets without the prescribed attachments thereto, in Winnegance Creek, need not allege the owner's name.

Ib.

3. A complaint under Priv. and Spec. L. of 1885, c. 463, sufficiently setting out an unlawful using of the kind of net forbidden by § 3, and also alleging the illegal killing of bass under § 5, is not bad for duplicity, the latter allegation being in the nature of an aggravation of the former offence. And when no venue is laid for the latter it may be rejected as surplusage. *Id.*
4. A complaint properly setting out the offence of using a net of the kind forbidden by § 3, is valid, although it alleges the forfeiture in the future tense. *Id.*

FISH WEIR.

See INDICTMENT, 13, 14.

FLOATABLE STREAM.

See WATER, 3.

FLOWAGE.

See MILL AND MILL-DAM, 1.

FORECLOSURE.

See MORTGAGE, 3.

FOREIGN COURT.

See JURISDICTION.

FORFEITURE.

See DAMAGES, 1.

FORGERY.

1. An indictment for forging an order on a savings bank, may properly allege that the intent of the forger was to defraud the person whose name is forged; and such intent will be conclusively presumed from the fact of forgery without further proof. *Rounds v. State*, 42.
2. A general verdict was rendered against a person accused of forging an order on a bank; one count in the indictment alleging the intent to have been to defraud the bank, and other counts to defraud the pretended drawer of the order, and after verdict the first named count was removed by *nolle prosequi*. *Held*, that the record is not thereby rendered erroneous. It is immaterial whether the jury based the verdict on one count or on all the counts; the offense was one and the same under each count, and there is no repugnancy between the counts. *Id.*

FRAUD.

1. It is a rule applicable alike in courts of equity as well as in courts of law, that fraud is not to be presumed, but must be established by proof. *Abbott v. Treat*, 121.

2. A representation of what the law will or will not permit to be done, will not ordinarily amount to such fraud as a court of equity will take cognizance of, but is to be regarded rather as the expression of an opinion than the assertion of a fact. *Ib.*

GIFT.

1. To constitute a valid gift *causa mortis*, it must be made during some illness or peril of the donor, and in contemplation and expectation of death from that illness or peril, and death must also ensue therefrom.

Parcher v. Saco and Biddeford Savings Bank, 470.

GRANITE.

See LIEN, 1.

GUARDIAN.

See BOND, 1, 2.

HOME.

See PAUPER, 7, 9.

HUSBAND AND WIFE.

1. An express promise by a husband to his wife, to pay her money to help support her and their child, does not change their relative rights and obligations, and hence is not supported by a legal consideration.

Fuller v. Lumbert, 325.

2. A promissory note given for the same purpose, to the wife, or to a third party for her benefit, falls within the principle above stated, and is without legal consideration. *Ib.*

See DOWER, 1. FALSE REPRESENTATION, 1. MARRIED WOMAN, 1.

ICE.

1. The owner of a mill-dam on an unnavigable stream, who does not own the bed of the stream above the dam, has a qualified interest in the water flowed but none in the ice formed upon it. *Stevens v. Kelley*, 445.
2. The riparian owner is the owner of the ice in such case, though the ice privilege is made by the flowage. *Ib.*
3. Where the owner of such a mill-dam maliciously and unnecessarily draws the water from the pond and thus destroys the ice field, he is liable in damages to the riparian owner who owned the land under the pond. *Ib.*

INDICTMENT.

1. On a motion in arrest of judgment, the court cannot consider matters which arise outside of the indictment and cannot be seen on the indictment itself.

State v. Gerrish, 20.

2. An indictment for concealing stolen goods is not void because the articles are described therein collectively instead of separately; it may be on that account more difficult to maintain. *Ib.*
3. Such an indictment may not entitle the state to a verdict, if the proof fails to show guilt as to any portion of the goods; but a general verdict against the accused implies conclusively that the proof was complete. *Ib.*
4. In larceny or concealment of stolen goods, it must affirmatively appear that the goods stolen or concealed were of some value; but the proof of that fact may be inferential merely; and the jury may infer it from an inspection of the goods or from a description of them by witnesses. *Ib.*
5. An indictment for forging an order on a savings bank, may properly allege that the intent of the forger was to defraud the person whose name is forged; and such intent will be conclusively presumed from the fact of forgery without further proof. *Rounds v. State, 42.*
6. It is not necessary to the validity of an indictment for maintaining a lottery-nuisance, that the name of the prosecutor (interested in the penalty) should be either inserted in or indorsed upon the indictment. *State v. Willis, 70.*
7. A count in an indictment is not ill for duplicity, which avers that the defendant was engaged in "a lottery, scheme or device of chance;" a lottery is a scheme and device of chance. *Ib.*
8. A count is not amenable to the objection of duplicity, which avers that the defendant printed, published and circulated an advertisement of a lottery. It is a single offence—that of nuisance—no matter in what form the defendant's participation consists. The count describes the means by which his guilt may be proved. *Ib.*
9. A count, which charges a defendant with inserting a lottery advertisement in a newspaper published in New York, and circulated in this state, without an averment that the defendant had something to do with its circulation in this state, is bad upon demurrer. *Ib.*
10. It is averred against the defendant, that, at a place and on a day named, he was concerned in a lottery by selling a ticket to one Henry May; the count describing the lottery and ticket. It would have been more finished pleading to allege that he was so concerned by "then and there" selling the tickets. But the law, not standing upon such nicety, regards the omitted words as immaterial. *Ib.*
11. The lottery ticket may be set out in an indictment by copy, and, if it does not appear upon its face to be a ticket, it may be alleged and proved to be such. *Ib.*
12. In an indictment for maintaining a liquor nuisance, the fact that the defendant used a building for the illegal keeping and sale of intoxicating liquors was averred, with time and place, in the usual manner; but the allegation that he thereby rendered himself guilty of keeping a nuisance was made with the blank space for the time left unfilled. *Held*, that the indictment contained a legal and sufficient statement of the time when the offense was committed. *State v. Buck, 193.*
13. When all the sections of a penal statute taken together show that the act in question was intended to be forbidden only in particular localities, the com-

plaint or indictment must allege that the act was committed in the particular locality to which the statute applies. *State v. Turnbull*, 392.

14. A complaint for fishing with weirs in Damariscotta river during Sunday close-time will be adjudged bad on demurrer, unless it is alleged that the weirs were located in that part of the river not exempted from the provisions of R. S., c. 40, § 43, by § 31 of same chapter. *Ib.*
15. An indictment for killing of deer, in violation of law, alleged the place of killing to be "at a Gore north of numbers two and three in range six, in said county of Franklin." *Held*, good. *State v. Libby*, 547.

See COMPLAINT, 1. NUISANCE, 1.

INDORSER OF WRIT.

The return of the proper officer upon an execution for costs, that he has demanded payment of it from the indorser of the original writ who neglected to pay the same, or to show personal property sufficient to satisfy the same, is conclusive evidence of the liability of the indorser in an action on the case against him, under R. S., c. 81, § 7. *Chesley v. Perry*, 164.

INSANE HOSPITAL.

See PAUPER, 5.

INSOLVENT LAW.

1. An appeal does not lie to the Supreme Judicial Court from a decree, by the court of insolvency, allowing a discharge to an insolvent who has made a composition settlement with his creditors, even though one cause of appeal be that the judge below refused to compel the insolvent to undergo an examination concerning his property at the request of creditors dissatisfied with the settlement. *Ex parte Morgan*, 36.
2. An answer upon oath, to a bill in equity, that does not call for answer upon oath, does not operate as evidence of the facts stated in it. *Clay v. Towle*, 86.
3. An unsecured creditor may join in a creditor's petition against an insolvent debtor at any time while the same is pending. *Ib.*
4. Upon such petition an adjudication of insolvency takes effect from the date when the petition was filed, and the validity of all transfers of property by the debtor is to be determined with reference to that date. *Ib.*
5. It is the duty of a director to know the financial condition of his corporation, and he can not avail himself of any dereliction of such duty to secure a personal advantage over other creditors of the corporation. *Ib.*
6. A mortgage given by an insolvent corporation to secure an existing debt, with intent to give a preference to a creditor, having reason to believe that the corporation was insolvent, and that a preference was intended in fraud of the insolvent law, made within four months of the filing of the insolvency petition, is void, and will be so declared by courts of equity. A mortgage for a loan made at the time, given by an insolvent corporation, in the absence of fraud is valid. *Ib.*

7. A debt due upon a contract existing at the time of the passage of the insolvent law is not barred by a discharge under that law, notwithstanding that it passed into a judgment after the enactment of that law.

Ross v. Tozier, 312.

8. The Supreme Judicial Court, as a court of equity, has supervisory rather than concurrent jurisdiction with the insolvent court; and it will not order an assignee to declare and pay a dividend until application has first been made to the insolvent court.

Bird v. Cleveland, 524.

See BANKRUPTCY. LIEN, 4.

INSURANCE (LIFE).

1. By the terms of a life insurance policy, the insurance company promised to pay the assured, his executors, administrators or assigns, for the sole use and benefit of his four children therein named, and the survivor or survivors of them, the amount expressed in the policy, after deducting therefrom any indebtedness the company might have on account of the contract, within ninety days after notice and proof of death. *Held*:

1. That the insurance, although for the sole use and benefit of the children, was payable, not to them, but by the express terms of the contract, to his own legal representative, who upon payment of the insurance would become a trustee under an express trust of the money thus collected for the *cestuis que trust*.

2. That the administrator of the assured was the only proper party who could maintain an action at law upon the contract, the policy having never been assigned, and the assured having died intestate.

3. That the insurance company, before payment over to the administrator of the amount due upon said policy, is not liable in trustee process at the suit of a creditor of one of the children named in the policy.

Phinney v. Union Mut. Life Ins. Co. 244.

2. The insurance company, on the twenty-ninth day of March, 1869, issued its policy of insurance, No. 4091, for the sum of one thousand dollars, upon the life of Charles J. Haley, payable upon his death to his wife, Julia A. Haley, her heirs, executors, administrators, or assigns, requiring quarterly premiums of four dollars and eighty-eight cents. During her life she paid premiums, amounting to one hundred and sixty-five dollars and ninety-two cents. Upon her death in March, 1877, in order that Charles J. Haley might acquire to his own use the benefits of the policy of insurance, he and the company contrived together to allow the policy to lapse from non-payment of premiums, and the company issued to Charles J. Haley a new policy of insurance for the same amount, requiring the same quarterly premiums, payable to him or his legal representatives, dated October 12th, 1877, numbered 32,705. Upon the new policy he paid in premiums the sum of seventy-eight dollars and eight cents, and died in September, 1881. Policy No. 4091 was not given or assigned to Charles J. Haley and it was a part of the consideration for policy No. 32,705. *Held*, on a bill of interpleader by the company upon which the respective administrators of the estates of Julia A. Haley and Charles J. Haley were required to interplead, that the insurance

money be divided between the administrators in the proportion to the amount of premiums paid by their respective intestates.

National Life Ins. Co. v. Haley, 268.

3. C obtained a certificate of life insurance from the United Order of the Golden Cross, which provided that the sum insured should be paid to H at C's death. That was done. *Held*, in an action by C's executor against H, that evidence was admissible to prove the defendant promised C, that, after deducting whatever sum might be due him from C, at C's death, from the insurance money, he would pay the balance over to C's heirs. *Held further*, that C's executor was the proper party to bring suit on such a promise.

Catland v. Hoyt, 355.

4. The Citizens' Mutual Relief Society of Portland, is a mutual life insurance company.

Sweet v. C'ty. Mut. Relief Society, 541.

5. Where an applicant for admission to a voluntary association for mutual relief, the rules of which did not admit members over sixty years of age, stated his age, in his application, to be fifty-nine years, when in fact he was sixty-four years of age,—it is such a misrepresentation as invalidates the contract of insurance issued thereon.

Ib.

6. Nor is such contract made valid by the incorporation of the members of the voluntary association and the assumption by that corporation of the contracts of the voluntary association.

Ib.

7. The treasurer of such a company can not ratify and make valid an invalid contract of insurance.

Ib.

8. The acceptance of the payment of unpaid assessments by the treasurer, made by the claimant after the death of the assured, is not a waiver by the company of any invalidity in the original contract of assurance.

Ib.

9. Assessments paid by the members of a mutual life insurance company into the treasury of the corporation, in accordance with its by-laws, become the money of the company.

Ib.

10. Members paying such assessments can not control the disposition of them, nor will an assignment of them by such members pass any title to the assignee.

Ib.

INSURANCE (MARINE).

1. An action may be maintained for the *pro rata* premium under the continuation clause of a marine insurance policy, when the vessel was at sea at the expiration of the term of insurance, though a previous action had been brought on the premium note and judgment therefor had been rendered in such action.

Insurance Company N. A. v. Rogers, 191.

2. In an action for the premium due upon a marine insurance policy, which was in the name of a part owner for the benefit of whom it may concern, the defendant presented evidence of other insurance, which made an over insurance upon his part of the vessel, and claimed to be liable, if at all, for only a ratable proportion of the premium. *Held*, that if this proposition is sound in law, the burden is on the defendant to show that the policies were simultaneous, and not intended to cover the interests of other owners.

Ib.

3. Where one owner of a vessel agrees to procure insurance for two or more other owners, and does procure insurance on their part with his in one policy, and collects on that policy for a loss, each of the other owners, whose portion of the vessel was covered by that policy, may maintain an action for his proportional part of the insurance money thus collected.

Gray v. Buck, 477.

INTOXICATING LIQUORS.

1. A warrant for search and seizure under § 40, c. 27, R. S., relating to intoxicating liquors, served by a constable of the county legally authorized to serve such process, but to whom no direction has been given in the warrant, is legally amendable at any time before final judgment, under § 57 of said chapter, the omission of such direction being but matter of form.

State v. Hall, 37.

2. An amendment inserting such direction being but matter of form, is within the power, as well as the discretion, of the court until final judgment.

Ib.

3. In an indictment for maintaining a liquor nuisance, the fact that the defendant used a building for the illegal keeping and sale of intoxicating liquors was averred, with time and place, in the usual manner; but the allegation that he thereby rendered himself guilty of keeping a nuisance was made with the blank space for the time left unfilled. *Held*, that the indictment contained a legal and sufficient statement of the time when the offense was committed.

State v. Buck, 193.

4. Intoxicating liquors found in a freight railroad station in Portland, in transit from Portsmouth, N. H., to the National Soldiers' Home, Togus, at which place alone, they were intended for sale by the Home Storekeeper, are not liable to seizure under R. S., c. 27, § 39, *et seq.*

State v. Cough, 401.

5. An indictment which charges a person with keeping and maintaining "a building occupied by himself as a saloon and shop and resorted to for the illegal sale of intoxicating liquors," is not sufficient to bring it within the statute against nuisances. (R. S., c. 17, § 1.)

State v. Dodge, 439.

See ARBITRATION AND AWARD, 1. COMPLAINT, 1.

JOINT-STOCK COMPANY.

See EQUITY, 7.

JUDGE OF PROBATE.

See PLEADING, 2.

JUDGMENT.

1. An abbreviated record of a judgment in the Supreme Judicial Court that complies with the requirements of R. S., c. 79, § 11, is valid.

Lewiston Steam Mill Company v. Merrill, 107.

2. A debt due upon a contract existing at the time of the passage of the

insolvent law is not barred by a discharge under that law, notwithstanding that it passed into a judgment after the enactment of that law.

Ross v. Tozier, 312.

See PLEADING, 8, 9, 11. PRACTICE, (LAW) 9, 10. RECORD, 1.

JUDGMENT IN REM.

See LIEN, 1, 2.

JURISDICTION.

The courts of this State are not bound by the findings of courts of other states upon the jurisdictional question of residence of the parties.

Gregory v. Gregory, 187.

See SUPREME JUDICIAL COURT.

JUSTICE OF THE PEACE.

See POOR DEBTOR'S DISCLOSURE.

KNOX AND LINCOLN RAILROAD CO.

See TAX, 1, 2.

LAND.

See PUBLIC LAND.

LAND DAMAGE.

See WAY, 6.

LARCENY.

1. An indictment for concealing stolen goods is not void because the articles are described therein collectively instead of separately; it may be on that account more difficult to maintain. *State v. Gerrish*, 20.
2. Such an indictment may not entitle the state to a verdict, if the proof fails to show guilt as to any portion of the goods; but a general verdict against the accused implies conclusively that the proof was complete. *Ib.*
3. In larceny or concealment of stolen goods, it must affirmatively appear that the stolen goods or concealed were of some value; but the proof of that fact may be inferential merely; and the jury may infer it from an inspection of the goods or from a description of them by witnesses. *Ib.*

LAW AND FACT.

See POOR DEBTOR'S DISCLOSURE, 3.

LEASE.

The statutory enactment, that a wife cannot, without the joinder of her husband, convey real estate conveyed to her by him, or paid for by him, or given or devised to her by his relatives, does not prevent her legally leasing the premises in her name alone for a term of years.

Perkins v. Morse, 17.

LEGACY.

See ASSETS, 1-4.

LEVY.

1. Where the return of a levy shows that the officer actually gave notice to the debtor after the seizure and before the choice of an appraiser, and the debtor refused to choose an appraiser, that is sufficient, without any date, to show that the officer had done all that was required in that respect.

Peaks v. Gifford, 362.

2. Such a return is a sufficient notice to a subsequent *bona fide* purchaser to authorize an amendment, where the return erroneously stated that the notice was given the debtor in "1876" when it was in fact given in "1879."

Ib.

3. Where the return shows that an undivided half of the lot specified was set off, the statement that it was set off by "metes and bounds" can have no effect.

Ib.

See ATTORNEY AT LAW, 1, 2.

LIEN.

1. No judgment *in rem* against the property attached, in an action to enforce a lien for labor on granite, will be rendered, where the defendant is the general owner of the property and made the contract for the labor, and no general notice has been given of the suit.
2. If the defendant in such action is the only person interested in the property attached, there is no necessity for judgment *in rem*; if he is not the only person so interested, no valid judgment *in rem* can be rendered, till all persons so interested have become parties to the suit, or had notice so to do.
3. One who performs labor, or furnishes labor or wood for manufacturing and burning brick, under a special contract by which he has a lien on the bricks for his pay, has no lien therefor under R. S., c. 91, § 28.

Hove v. Wiscasset Brick and Pottery Co. 227.

4. Such a lien is not affected by the insolvency of the debtor.

Ib.

See RECORD, 1.

LIFE-ESTATE.

A testator made a devise in these words: "The certain lot of land aforesaid set off to me from my son, Isaac Hilton, Junior, I devise, give and bequeath

to him, the said Isaac, Junior, in trust for his heirs so long as he shall live and after his death, to his heirs, their heirs and assigns, to have and to hold forever." *Held*, that the effect of this devise under R. S., c. 73, § 6, was to vest a life-estate in Isaac Hilton, Junior, and a fee simple in his heirs.

Plummer v. Hilton, 226.

See WILL, 8.

LIMITATIONS, STATUTE OF.

1. The statute, R. S., c. 82, § 137, requires that either the action for perjury or the proceedings for review, should be begun within three years from judgment in the action in which the perjury was committed. The party who waits more than three years before doing anything, can not then revive his right of action against a witness by instituting proceedings for a review.

Landers v. Smith, 212.

2. An action against a sheriff for false imprisonment, by the act of a deputy, must be brought within two years after the cause of action accrues.

Trask v. Wadsworth, 336.

3. Entries of partial payments in the hand-writing of a deceased partner, in the firm books, are not admissible in evidence as proof of payments, for the purpose of removing the bar of the statute of limitations, in an action by the firm to recover the balance of the account. *Libby v. Brown*, 492.

LIQUIDATED DAMAGES.

See DAMAGE, 1.

LOGS.

A and H, each, owned a lot of logs of the same kind, quality and value, and bearing the same mark. H (and another party) contracted to saw A's logs at the same mill where his own were to be manufactured. The logs became intermixed without the fault of either party. *Held*: That A was entitled to his proportional part of the lumber manufactured from all the logs, and that if H converted to his own use more than his proportional part of the lumber, he would be liable in trover for the same without a special demand.

Martin v. Mason, 452.

See RECORD, 1.

LORD'S DAY.

See PRACTICE, (LAW) 27.

LOTTERY.

1. It is not necessary to the validity of an indictment for maintaining a lottery-nuisance, that the name of the prosecutor (interested in the penalty) should be either inserted in or indorsed upon the indictment.

State v. Willis, 70.

2. A count in an indictment is not ill for duplicity, which avers that the

defendant was engaged in "a lottery, scheme or device of chance;" a lottery is a scheme and device of chance. *Ib.*

3. A count is not amenable to the objection of duplicity, which avers that the defendant printed, published and circulated an advertisement of a lottery. It is a single offence—that of nuisance—no matter in what form the defendant's participation consists. The count describes the means by which his guilt may be proved. *Ib.*
4. A scheme is none the less a lottery, because it promises a prize to each ticket holder, the prizes to be drawn being of different values; nor because prizes are called presents in the prospectus; nor because the tickets consist of receipts for subscriptions to a newspaper, but numbered to compare with the numbers upon the articles to be distributed. *Ib.*
5. A count, which charges a defendant with inserting a lottery advertisement in a newspaper published in New York, and circulated in this state, without an averment that the defendant had something to do with its circulation in this state, is bad upon demurrer. *Ib.*
6. It is averred against the defendant, that, at a place and on a day named, he was concerned in a lottery by selling a ticket to one Henry May; the count describing the lottery and ticket. It would have been more finished pleading to allege that he was so concerned by "then and there" selling the tickets. But the law, not standing upon such nicety, regards the omitted words as immaterial. *Ib.*
7. The lottery ticket may be set out in an indictment by copy, and, if it does not appear upon its face to be a ticket, it may be alleged and proved to be such. *Ib.*

MAJORITY.

See CONTRACT, 4.

MARINE INSURANCE.

See INSURANCE (MARINE).

MARRIAGE.

In proof of a disputed marriage in civil suits, (other than actions for seduction) cohabitation, reputation, the declarations of the parties, written or oral, and their conduct, and all other circumstances usually attending the marriage relation and indicative of its existence, are admissible in evidence; and where there is shown to have been cohabitation for some years and children born to the parties, it is admissible to show what kind of a family the woman had previously belonged to and what kind of a home she had left.

Camden v. Belgrade, 204.

MARRIED WOMAN.

1. The statutory enactment, that a wife can not, without the joinder of her husband, convey real estate conveyed to her by him, or paid for by him, or given or devised to her by his relatives, does not prevent her legally leasing the premises in her name alone for a term of years. *Perkins v. Morse*, 17.

2. Where a married woman who has been totally deserted by her husband, makes application for and receives pauper supplies, her coverture is no bar to an action against her for re-imbursement under R. S., c. 24, § 45.

Peru v. Poland, 215.

MASTER AND SERVANT.

1. A master's liability for an injury to his servant caused by defective machinery, furnished by the former for the latter's use, is not absolute.

Hull v. Hall, 114.

2. To render the master liable for an injury to his employee caused by defective machinery furnished by the former for the latter's use, it must appear that the master knew, or by the exercise of proper diligence ought to have known of its unfitness, and that the servant did not know, or could not reasonably be held to have known of the defect.

Ib.

3. A city is not liable for an injury to a laborer employed in constructing a sewer, when caused by the carelessness of one who had the oversight and direction of the work.

Conley v. Portland, 217.

4. The plaintiff was employed by the defendants to remove the sand, or "form" from a large oven which had been recently built by workmen employed by the defendants' lessor. After having taken it nearly all out by means of shovels and other tools furnished him by another servant in the employment of the defendants, the plaintiff crawled into the oven for the purpose of cleaning out the corners, and while in there the oven fell in upon him, burying him in brick, sand and mortar, and causing the injuries for which this suit is brought. There was no evidence that the defendants had any knowledge of the dangerous condition of the oven at the time the plaintiff met with the accident, or that they were negligent in not knowing it. Held, that the verdict in favor of the plaintiff could not be sustained.

Nason v. West, 253.

5. In order to entitle the plaintiff to recover, it must be shown that the defendants knew, or ought to have known, of the dangerous condition of the oven, and that the plaintiff did not know, or could not reasonably be held to have known of the defect which led to the injury.

Ib.

6. The mere fact that the plaintiff may have sustained an injury while in the employment of the defendants, or upon their premises, raises no presumption of wrong on their part, and is not sufficient upon which to found a verdict.

Ib.

7. Negligence being the basis of the plaintiff's action, it must be proved by evidence having legal weight, and upon which the verdict of a jury would be allowed to stand.

Ib.

8. A mere scintilla of evidence is not sufficient.

Ib.

MILL AND MILL-DAM.

1. Where an owner of land conveyed to another a mill and a limited water supply therefor, the conveyance restricting the grantee's right of flowage over the grantor's other land to an extent that would ensue from a dam, at the mill, only four feet high, such grantee is not thereby debarred from attempting to

obtain a higher flowage under the flowage act; and, for raising the head of water higher than the deed prescribes, the grantor's remedy in the first instance is under the flowage act, and not by suit at common law.

Graham v. Virgin, 338.

2. The complaint for flowage under the mill act only lies where the flowage is caused by a head of water designedly raised for the purpose of working a mill.

Clapp v. Manter, 358.

3. Such a complaint can not be sustained by flowage caused by a head of water accidentally raised by a jam of drift-stuff and applied to no useful purpose.

Ib.

See ICE, 1-8.

MONEY HAD AND RECEIVED.

1. Money received by the pledgee, from the legal sale of a pledge, becomes his own, to the extent of his debt; and he holds the balance, as "money had and received," for the pledgor's use.

Fletcher v. Harmon, 465.

2. Money received by the pledgee, from the illegal sale of a pledge, the pledgor, by waiving the tort, may require to be applied in payment of his debt, and the pledgee would hold any balance, as money had and received for the pledgor's use.

Ib.

3. Money so held may be recovered in assumpsit, or by set-off.

Ib.

4. The value of securities in pledge, tortiously dealt with by the pledgee, unless reduced to money or its equivalent, can not be recovered in assumpsit, as money "had and received," nor by set-off.

Ib.

5. An attachment upon a writ containing a count for money had and received, without a specification of claim, creates no lien upon real estate. When the truth of a return of a levy upon execution is not denied, the same may be amended by the officer, who made it, by signing the same; but ordinarily, by saving the rights of innocent purchasers.

Briggs v. Hodydon, 514.

MORTGAGE.

1. A mortgage given by an insolvent corporation to secure an existing debt, with intent to give a preference to a creditor, having reason to believe that the corporation was insolvent, and that a preference was intended in fraud of the insolvent law, made within four months of the filing of the insolvency petition, is void, and will be so declared by courts of equity. A mortgage for a loan made at the time, given by an insolvent corporation, in the absence of fraud is valid.

Clay v. Towle, 86.

2. The interest and title of a mortgagee in real estate, upon his decease, vests as assets in his executor or administrator, who is the proper party to any proceeding for the foreclosure of the mortgage.

Plummer v. Doughty, 341.

3. Where suit is brought to foreclose a mortgage, on account of a breach thereof, given to secure a bond for the support of a husband and wife during their natural lives, a breach of such bond must be shown, but such breach need not be shown to have occurred during the lifetime of the husband who died first.

Ib.

4. If there has been a breach of the bond since the death of the husband and

before the commencement of the suit, it is sufficient to maintain the action.

Ib.

5. Nor is it necessary, to entitle a recovery in such case, to show that any claim had been made by the widow for her support, on the administrator of the deceased mortgagor, before suit was commenced. *Ib.*

6. The widow of the deceased mortgagee, who had dower interest in the premises which she had not released, has no such legal estate in the premises, before her dower has been set out or assigned to her, as would entitle her to convey any part of the premises to a third person, as against the administrator of the deceased mortgagee. *Ib.*

7. Where the surety on a mortgage debt pays the same to the holder and receives the note and mortgage, without any assignment or discharge written thereon, he can not maintain a bill in equity against the owners of the equity of redemption, praying, that the mortgage "may be decreed to be still subsisting, that he may be subrogated to the rights of the mortgagee therein and may be empowered to foreclose the same according to law."

Lynn v. Richardson, 367.

8. When a mortgagee, who holds two mortgagees, one of real and the other personal estate, to secure the payment of the same debt, forecloses the personal mortgage, takes possession of the property and converts it to his own use, if its value exceeds the debt secured, it operates as a payment or satisfaction of it. There is no longer an existing debt to uphold the real mortgage. *Androscoggin Savings Bank v. McKenney*, 442.

See DEED, 6, 7.

MORTGAGE (CHATTEL).

1. Before a mortgagee of personal property, attached by an officer as the property of the mortgagor and placed in the hands of a servant of the officer for safe keeping, can maintain replevin therefor against such servant he must give the notice in writing required by R. S., c. 81, § 44. The servant may make the same defence that his master, the attaching officer, could make. *Potter v. McKenney*, 80.

2. The owner of a pair of steers mortgaged them with other personal property to D, who assigned the mortgage to the defendant, but prior to the assignment, the owner *bona fide* released his right of redeeming the steers and sold them to D who subsequently sold them to K taking back a mortgage thereof for the purchase money, which mortgage, D assigned to the plaintiff. In trover against the defendant who had taken possession of the steers: *Held*, that the defendant's requested instruction,—that if D owned the steers when he delivered the mortgage to the defendant, that the title would pass to the defendant if D gave him to understand that the steers were included in the mortgage, was rightly refused, there being no testimony on which to base the instruction. *Wilbur v. Josselyn*, 396.

See MORTGAGE, 8.

NAME.

See DEED, 3, 5. EVIDENCE, 3.

NATIONAL SOLDIERS' HOME, TOGUS.

See INTOXICATING LIQUOR, 4.

NEGLIGENCE.

1. A person waiting at a railroad station for passage upon a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on the side track while the station room was being cleaned, is entitled to the same protection from the company while in the car as if in the regular waiting room; in either place the person is a passenger in the care of the company. *Shannon v. B & A. R. R. Co.* 53.
2. For a passenger to jump upon or off of a moving train is *prima facie* negligence; if injured thereby, it is incumbent on him, in an action against the railroad, to prove a reasonable excuse for the act. *Ib.*
3. Whether a passenger had or not a reasonable excuse for jumping upon or off of a moving train is usually a question for the jury; an extreme case either way may be determined by the court. Fear of personal danger is not the only excuse that will exonerate one in jumping from a moving train. A passenger may in some cases be justified in alighting from a moving train merely to save himself from serious inconvenience; all depends upon the speed of the train and the attendant circumstances. *Ib.*
4. Three ladies, while waiting for the train to start in which they were to take passage, were invited by the station agent to sit in an empty car on a side track while the waiting room was being cleaned, he assuring them that the car would remain there; without signal or notice of any kind, the train to which the car was attached began to be moved out by an engine, without conductor or brakeman on board; startled by the sudden and unexpected movement, and alarmed lest they might be carried away from their intended destination, they hurried to the rear of the car and jumped out, while the train was still abreast of the platform and apparently moving slowly; one of them became injured by jumping; she obtained a verdict against the company; and the court determined that the verdict was not so far amiss on those facts as to require it to be set aside. *Ib.*
5. A person undertook to drive with a horse and pung over a road, across which was flowing at the time a stream of water thirty or forty rods wide, and in some places not less than three feet deep, with a current moving at the rate of five miles an hour, and carrying upon its surface cakes of ice, some of which were twenty-five or thirty feet in diameter; at some stage of his journey, and in some way, he and his horse got out of the road and were precipitated into the deeper channel of the river below and drowned. *Held*, that one who knowingly and unnecessarily exposes himself to such perils can not be regarded as in the exercise of due care. *Merrill v. North Yarmouth*, 200.
6. The plaintiff was employed by the defendants to remove the sand, or "form" from a large oven which had been recently built by workmen employed by the defendant's lessor. After having taken it nearly all out by

means of shovels and other tools furnished him by another servant in the employment of the defendants, the plaintiff crawled into the oven for the purpose of cleaning out the corners, and while in there the oven fell in upon him, burying him in brick, sand and mortar, and causing the injuries for which this suit is brought. There was no evidence that the defendants had any knowledge of the dangerous condition of the oven at the time the plaintiff met with the accident, or that they were negligent in not knowing it. *Held*, that the verdict in favor of the plaintiff could not be sustained.

Nason v. West, 253.

7. In order to entitle the plaintiff to recover, it must be shown that the defendants knew or ought to have known, of the dangerous condition of the oven, and that the plaintiff did not know, or could not reasonably be held to have known of the defect which led to the injury. *Ib.*
8. The mere fact that the plaintiff may have sustained an injury while in the employment of the defendants or upon their premises, raises no presumption of wrong on their part, and is not sufficient upon which to found a verdict. *Ib.*
9. Negligence being the basis of the plaintiff's action, it must be proved by evidence having legal weight, and upon which the verdict of a jury would be allowed to stand. *Ib.*
10. A mere scintilla of evidence is not sufficient. *Ib.*
11. It is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is obstructed he must listen carefully; and to do this when riding with bells attached to his team, he must stop his horse. *Chase v. Maine Central R. R. Co.* 346.

See MASTER AND SERVANT, 1. RAILROAD, 15.

NEW TRIAL.

When the evidence is conflicting on the point upon which the case turned, the verdict will not be set aside unless it is clearly against the weight of evidence. *Purinton v. Maine Central R. R. Co.* 569.

See PRACTICE, (LAW) 16.

NEW YORK COURT.

SEE PRACTICE, (LAW) 19.

NON COMPOS MENTIS.

See PAUPER, 1, 2.

NOTICE.

1. A purchaser of real estate *pendente lite* is chargeable with notice of the character of the suit, and of the extent of the claim asserted in the pleadings in

reference to the title to such real estate, without express or implied notice in point of fact. *Smith v. Hodsdon*, 180.

2. As such purchaser, he is bound by any judgment that may have been entered against the party from whom he has derived his alleged title, equally as if he had been a party to such judgment from the beginning. And the litigating parties are exempted from taking any notice of the title so acquired; nor are they obliged to make such purchaser a party to the suit.

Id.

3. A record that discloses the relation of attorney and client, touching a levy upon real estate, is notice to subsequent purchasers from the attorney, that he cannot dispute the validity of the levy, and take an after-acquired title to the land levied upon, in his own right. *Briggs v. Hodgdon*, 514.

See AGENCY 4. LEVY 2.

NUISANCE.

1. An indictment which charges a person with keeping and maintaining "a building occupied by himself as a saloon and shop and resorted to for the illegal sale of intoxicating liquors," is not sufficient to bring it within the statute against nuisances, (R. S., c. 17 § 1., *State v. Dodge*, 439.

OFFICER.

See FIRE DEPARTMENT, 1, 2. LIMITATIONS, STATUTE OF, 2. REPLEVIN, 2.

OFFICER'S RETURN.

The return of the proper officer upon an execution for costs, that he has demanded payment of it from the indorser of the original writ who neglected to pay the same, or to show personal property sufficient to satisfy the same, is conclusive evidence of the liability of the indorser in an action on the case against him, under R. S., c. 81, § 7. *Chesley v. Perry*, 164.

See LEVY, 1-3.

PARTITION.

1. Between tenants in common, partition is in equity a matter of right and not of discretion, whenever either of them will not hold or use the property in common. Courts of equity, concurrently with courts of law, have jurisdiction of partition of land among tenants in common; and equity jurisdiction was expressly conferred by R. S., (1857) c. 77, § 5, cl. 6, which provision has been incorporated in the subsequent revision.

Nash v. Simpson, 142.

2. To entitle a complainant to a decree for partition, he must show a clear, legal title in himself; and when his title is disputed and not established, the bill may be retained to give him a reasonable opportunity to establish it at law.

Id.

3. When the complainant claims title under a will and files his bill under the statute for a construction of the will, and for an accounting and partition, the court, in the absence of any defect in his title, having thus acquired jurisdiction for the purpose of construing the will, has authority to do complete justice between the parties by compelling an account and partition.

Ib.

PARTNERSHIP.

One partner agreed in writing to sell to a co-partner his interest in the company's property, the property consisting of a store and stock of goods (furniture) therein, and some other personal property, the whole worth about twenty-five thousand dollars, the sale to be at cost for most of the property, the balance to be taken at an appraisal if the parties could not agree on its value, the terms of the sale to be cash on delivery, and either party who should break the contract was to forfeit to the other the sum of five hundred dollars. *Held*, That the five hundred dollars were intended by the parties to be liquidated damages.

Maxwell v. Allen, 32.

PAUPER.

1. A person, *non compos mentis*, though more than twenty-one years of age, not emancipated, can not acquire an independent settlement by a residence in a town for five successive years, but will follow the settlement of the father.

Winterport v. Newburgh, 136.

2. The father of such unemancipated *non compos* person, while living in the defendant town, ten years before he removed therefrom, made application for relief to the overseers of the poor of that town, which relief was thereafter furnished each year to 1868, when he moved to the plaintiff town, and, with the exception of that year, relief was afterwards furnished by the defendant town till January, 1882, two years prior to the commencement of this suit. *Held*:

That the settlement of the father was not changed from the defendant to the plaintiff town; and that the only question involved was whether the supplies afterwards furnished by the plaintiff town were necessary and proper within the meaning of the statute.

Ib.

3. Where a married woman who has been totally deserted by her husband, makes application for and receives pauper supplies, her coverture is no bar to an action against her for re-imbursement under R. S., c. 24, § 45.

Peru v. Poland, 215.

4. Where the settlement of a pauper is in dispute, and a prior settlement is admitted to have been in the defendant town, the burden is upon the defendant to show that the pauper has gained a settlement elsewhere by a residence of five successive years without receiving supplies, directly or indirectly, as a pauper.

Etna v. Brewer, 377.

5. In a suit by one town against another to recover the expenses of examination, commitment and support of an insane person in the insane hospital, where it appears that the municipal officers had the evidence and certificate of

the two examining physicians before them upon which to base their proceedings of commitment, and the certificate of commitment and of the physicians is introduced and received in evidence without objection, the verdict will not be set aside on the ground that the evidence fails to show that the municipal officers kept a record of their doings as required by R. S., c. 143, § 13. *Ib.*

6. The question of residence is in part one of intention. *Ib.*
7. Declarations accompanying the act of leaving a town where a person's residence is, expressing the object and purpose of making a home in another town, or of performing acts indicating a change of residence from that town, are admissible in evidence on the question of intention. *Ib.*
8. They accompany an act, the nature, object or motive of which is a proper subject of inquiry, and as such, are a part of the *res gestae*. *Ib.*
9. No one can become a member of another person's family, so as thereby to gain a home within the meaning of the law relating to the settlement of paupers, unless voluntarily there, and with the consent of the one having control thereof. *Il.*
10. Where a tenant at will whose rent was payable monthly at the end of each month, neglected to pay for January and February, and on March 21 the landlord threatened immediate expulsion unless he then paid for the three months; and thereupon, at the tenant's request the overseers of the poor paid it. *Held* that all the rent thus paid was simply the debt of the tenant and not pauper supplies. *Vinalhaven v. Lincolnville, 422.*

PAYMENT.

See LIMITATIONS, STATUTE OF, 3. MORTGAGE, 8.

PENALTY.

See DAMAGE, 1.

PERJURY.

See PRACTICE (LAW) 17.

PERMIT.

See PUBLIC LAND, 1.

PLAN.

When a plan has been made to delineate an actual survey upon the surface of the earth, and a deed describes the lot by its number "according to the plan," the actual survey rather than the plan fixes the location and boundaries of the lot. *Bean v. Bachelder, 184.*

PLEADING.

1. A declaration on a guardian's bond, which omits the averment, that the interest of the persons suing had been specifically ascertained by probate decrees, may be amended by adding the omitted words.

McFadden v. Hewett, 24.

2. The declaration is not faulty for alleging that the action had been authorized by the judge of probate, when it is immaterial whether he assented to the action or not; the over-averment may be disregarded or stricken out. *Ib.*
3. In personal actions the time of every traversable fact must be stated in the declaration; that is, every traversable fact must be alleged to have taken place on some particular day. *Cole v. Babcock*, 41.
4. In a declaration to recover damages for alleged slanderous words, the only allegation in reference to time was that the words were uttered "about the first of April, 1884." *Held*, That the word "about" rendered the allegation of time indefinite and uncertain. *Ib.*
5. The plea of general issue admits the plaintiff's corporate existence and power to sue.
Rockland, Mt. Desert & Sullivan Steamboat Co. v. Sewall, 167.
6. The office of a declaration is to make known to the opposite party and the court, the claim set up by the plaintiff. *Wills v. Churchill*, 285.
7. The account annexed to a declaration in assumpsit contained the following items under different dates: "Labor, \$2.00"; "Shingle machine, 100.00"; "Pd. freight, 5.00"; "To labor, 3.35." *Held*, on demurrer, declaration adjudged good. *Ib.*
8. A judgment of the Supreme Court of the city and county of New York in favor of the plaintiff, is a bar to the further prosecution of an action in Maine between the same parties and for the same cause, although the action was pending in Maine when the other action was commenced in New York.
Whiting v. Burger, 287.
9. Such judgment may be pleaded specially as a bar to the further maintenance of the action here, or it may be proved under the general issue. *Ib.*
10. The court has power in its discretion to allow the general issue to be filed after the filing of a special plea in bar, and no exception lies to the exercise of this discretion. *Ib.*
11. Where there was a misdescription of some of the items embraced in the former judgment, which misdescription would have been amendable, parole evidence is admissible to prove that such items are identical with those declared on in the pending action. *Ib.*
12. If, pending a real action for the recovery of land, the title to the land, and the right of possession, pass from the plaintiff and become vested in the defendant, this fact may be pleaded in bar of the further maintenance of the suit.
Leavitt v. School District in Harpswell, 574.
13. It must be specially pleaded in bar of the further prosecution of the suit, and not in bar of the suit generally. *Ib.*
14. When a plea in bar to the further prosecution of a suit is sustained, the plaintiff will recover his costs up to the time of the filing of the plea; and the defendant his costs subsequently incurred. *Ib.*

See ABATEMENT, 1. COMPLAINT, 2. EXECUTOR AND ADMINISTRATOR, 1.

INDICTMENT, 5-11.

PLEDGE.

1. Money received by the pledgee, from the legal sale of a pledge, becomes his

own, to the extent of his debt; and he holds the balance, as "money had and received," for the pledgor's use. *Fletcher v. Harmon*, 465.

2. Money received by the pledgee, from the illegal sale of a pledge, the pledgor, by waiving the tort, may require to be applied in payment of his debt, and the pledgee would hold any balance, as money had and received for the pledgor's use. *Ib.*
3. Money so held may be recovered in assumpsit, or by set-off. *Ib.*
4. The value of securities in pledge, tortiously dealt with by the pledgee, unless reduced to money or its equivalent, can not be recovered in assumpsit, as money "had and received," nor by set-off. *Ib.*
5. The contract, touching a pledge to secure a debt, is collateral; and damages for its breach can not be allowed by way of recoupment, in defense of a suit to recover the debt. *Ib.*

POOR DEBTOR'S DISCLOSURE.

1. The judgment of two justices of the peace and quorum, who hear a debtor's disclosure, having jurisdiction, can not be contradicted, as between the parties, upon any point judicially determined by them, except as by R. S., c. 113, § 69. *Cannon v. Seveno*, 307.
2. When the justices adjudicate, as appears by their record, that it does not appear from the debtor's disclosure that he had in his possession any account against any one, the record is conclusive and can not be contradicted by the debtor's disclosure, signed and sworn to by him. *Ib.*
3. If such question is open, whether it so appears or not, by such disclosure, it is a question of law for the court, and not for the jury. *Ib.*
4. Where the creditor is present by his attorney, and the debtor discloses an attachable interest in real estate, the justices are not required to give the creditor a certificate thereof, as provided in R. S., c. 113, § 37, unless requested so to do by the creditor or his attorney, and a failure to do so does not affect the debtor's discharge. *Ib.*
5. Justices to hear a poor debtor's disclosure can not be selected on Fast-day. *Poor v. Beatty*, 580.
6. In a suit upon a poor debtor's bond where there is no defence, the plaintiff is entitled to recover the amount of his execution, costs and fees of service, with interest, as provided in R. S., c. 113, § 40. *Ib.*

PORTSMOUTH BRIDGE.

See Tax, 3.

PRACTICE (EQUITY).

1. In equity, a finding is not set aside for the improper rejection or reception of testimony, if the full court decides upon the whole facts that the verdict or decree below is satisfactory. *Carlton v. Rockport Ice Co.* 49.
2. An answer upon oath, to a bill in equity, that does not call for answer upon oath, does not operate as evidence of the facts stated in it. *Clay v. Towle*, 86.
3. An unsecured creditor may join in a creditor's petition against an insolvent debtor at any time while the same is pending. *Ib.*

4. Circumstances stated in the opinion which will warrant holding the bill to allow the complainant opportunity to establish his legal title. The defendant may dispute the complainant's legal title which the latter has conveyed away, though the former does not claim under it. *Nash v. Simpson*, 142.
5. The law court has no jurisdiction of a cause in equity reported upon agreement of counsel alone. The methods of procedure provided by R. S., c. 77, §§ 20, 23, 25, only, can give the law court jurisdiction in such cases.
Whittemore v. Russell, 337.

PRACTICE (LAW).

1. On a motion in arrest of judgment, the court can not consider matters which arise outside of the indictment and can not be seen on the indictment itself.
State v. Gerrish, 20.
2. A general verdict was rendered against a person accused of forging an order on a bank; one count in the indictment alleging the intent to have been to defraud the bank, and other counts to defraud the pretended drawer of the order, and after verdict the first named count was removed by *nolle prosequi*. Held, that the record is not thereby rendered erroneous. It is immaterial whether the jury based the verdict on one count or on all the counts; the offense was one and the same under each count, and there is no repugnancy between the counts.
Rounds v. State, 42.
3. Matter in abatement, whether by plea or motion, must be pleaded in a trial justice's court before a general continuance of the action. *Otis v. Ellis*, 75.
4. Appealing from the decision of a matter in abatement before the general issue is pleaded, is a waiver of any defense under that issue. *Ib.*
5. No judgment *in rem* against the property attached, in an action to enforce a lien for labor on granite, will be rendered, where the defendant is the general owner of the property and made the contract for the labor, and no general notice has been given of the suit.
Martin v. Darling, 78.
6. If the defendant in such action is the only person interested in the property attached, there is no necessity for judgment *in rem*; if he is not the only person so interested, no valid judgment *in rem* can be rendered, till all persons so interested have become parties to the suit, or had notice so to do.
Ib.
7. Writs of error lie only for the correction of such defects as are apparent from inspection of the record, a transcript of which should be produced at the trial.
Tyler v. Erskine, 91.
8. A party, desiring to reverse a judgment for error, should require the clerk to complete and attest his record, that he may produce a transcript of it at the trial, and until this is done such party is not entitled to relief by writ of error.
Ib.
9. When the defendant in a real action to recover land dies, a citation to all persons interested in the estate of the deceased tenant, without naming any one, is not sufficient to authorize the court to enter judgment for the land.
Trask v. Trask, 103.
10. A judgment for costs in such action against the estate in the hands of the

- administrator, can only be entered when the demandant has judgment for the land, and is incident thereto. *Ib.*
11. An abbreviated record of a judgment in the Supreme Judicial Court that complies with the requirements of R. S., c. 79, § 11, is valid.
Lewiston Steam Mill Co. v. Merrill, 107.
12. Writs of error for errors in law lie only for defects apparent upon the face of the record. *Ib.*
13. If there be error in law that would appear from an extended record, that either party desires to avail himself of upon a writ of error, he should before trial, require the clerk to make an extended record of the judgment sought to be reversed, (and if he refuses so to do, procure an order from the court directing such record to be made), and then present a transcript of such extended record, that the court may know from inspection of it whether an error exists. *Ib.*
14. Defects in a declaration that are proper subjects of amendment are cured by default and cannot be reached by writ of error. *Ib.*
15. A record that recites a command in the writ for the officer to attach certain specified logs upon which a lien is claimed, and the return of the officer that he did attach the same and put his mark upon them, and that, within five days thereafter, he filed in the clerk's office of the town where the logs lay the usual copy of his attachment, is sufficient to sustain a judgment *in rem* against the logs. *Ib.*
16. A motion for a new trial on the ground of newly discovered evidence will not be granted if the evidence in support of it is not taken within the time ordered by the court.
Camden v. Belgrade, 204.
17. The statute, R. S., c. 82, § 137, requires that either the action for perjury or the proceedings for review, should be begun within three years from judgment in the action in which the perjury was committed. The party who waits more than three years before doing anything, can not then revive his right of action against a witness by instituting proceedings for a review.
Landers v. Smith, 212.
18. An error must affirmatively appear in order to sustain an exception; it can not be assumed.
Johnson v. Day, 224.
19. A judgment of the Supreme Court of the city and county of New York in favor of the plaintiff, is a bar to the further prosecution of an action in Maine between the same parties and for the same cause, although the action was pending in Maine when the other action was commenced in New York.
Whiting v. Burger, 287.
20. Such judgment may be pleaded specially as a bar to the further maintenance of the action here, or it may be proved under the general issue. *Ib.*
21. The court has power in its discretion to allow the general issue to be filed after the filing of a special plea in bar, and no exception lies to the exercise of this discretion. *Ib.*
22. Where there was a misdescription of some of the items embraced in the former judgment, which misdescription would have been amendable, parole evidence is admissible to prove that such items are identical with those declared on in the pending action. *Ib.*

23. It is not an expression of opinion for the presiding justice to review the evidence, or to state isolated items of evidence.

Murchie v. Gates, 300.

24. Neither the Declaration of Rights, § 5, nor R. S., c. 134, § 19, authorizes the county attorney in the trial of a criminal prosecution, to urge in argument to the jury that the defendant did not take the stand and deny the testimony introduced by the prosecution.

State v. Bunks, 490.

25. If the presiding justice, in his charge to the jury, errs in assuming a matter to be uncontroverted, which a party intended to controvert, his attention should be called to the error before the jury retire.

State v. Fenlason, 495.

26. An *alibi* is not a conclusive answer to an indictment unless the respondent proves himself to have been at so great a distance as to render it impossible that he should have participated.

Ib.

27. Sending blank forms of a verdict to a jury after twelve o'clock Saturday night, with instructions to seal up their verdict when agreed upon, does not invalidate the verdict.

Ib.

28. Where the party is present when a verdict is received, affirmed and recorded, and does not object to the manner of receiving and recording, he waives any irregularity that may have occurred, specially when he can not show that he was prejudiced thereby.

Ib.

29. When the evidence is conflicting on the point upon which the case turned, the verdict will not be set aside unless it is clearly against the weight of evidence.

Purinton v. Maine Central R. R. Co. 569.

See MILL AND MILL-DAM, 1. MORTGAGE, (CHATTEL) 2.

POOR DEBTOR'S DISCLOSURE, 4.

PREFERENCE.

See INSOLVENT LAW, 6.

PREMIUM.

See INSURANCE, (MARINE) 1, 2.

PRESCRIPTION.

See WATERS, 2, 9.

PRESIDING JUSTICE.

1. It is not an expression of opinion for the presiding justice to review the evidence, or to state isolated items of evidence. *Murchie v. Gates*, 300.
2. If the presiding justice, in his charge to the jury, errs in assuming a matter to be uncontroverted, which a party intended to controvert, his attention should be called to the error before the jury retire.

State v. Fenlason, 495.

PRESUMPTION.

See DEED, 5.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVATE PROPERTY.

See EMINENT DOMAIN, 1, 5.

PROBATE COURT.

See APPEAL, 8.

PROMISSORY NOTE.

1. An express promise by a husband to his wife, to pay her money to help support her and their child, does not change their relative rights and obligations, and hence is not supported by a legal consideration.

Fuller v. Lumbert, 325.

2. A promissory note given for the same purpose, to the wife, or to a third party for her benefit, falls within the principle above stated, and is without legal consideration.

Ib.

3. A promissory note reciting "we" promise to pay, and signed "D. P. Livermore, Treas'r Hallowell Gas Light Co.," is the note of the individual and not of the corporation.

McClure v. Livermore, 390.

4. An action on such a note against the corporation, and its default, will not estop the owner from maintaining an action against the individual when it does not appear that the acts of the plaintiff caused the defendant to change his position, or to take some action injurious to himself.

Ib.

See SUPREME JUDICIAL COURT, 2.

PROPOSAL.

See CONTRACT, 2.

PROSECUTING ATTORNEY.

See PRACTICE, (LAW) 24.

PUBLIC LANDS.

The assessors of a plantation were authorized by the land agent to guard certain lots, reserved for public uses, against trespassers. They had no right nor authority to permit or sell timber or other property from the lots. After exploring the lots, supposing they had such authority, they gave permits in writing to certain parties to take off the hemlock bark and timber from the lots. The permits were assigned to other parties who subsequently peeled the bark, and cut and carried away a portion of the timber, for which

acts an action of trespass was brought against the assessors, and they were held liable. *State v. Smith*, 260.

PUBLIC OFFICER.

See FIRE DEPARTMENT, 1, 2.

PURCHASER PENDENTE LITE.

See REAL ACTIONS, 1-3.

RAILROAD.

1. A person waiting at a railroad station for passage upon a train soon to depart, who is invited by the ticket agent to sit in an empty car standing on the side track while the station room was being cleaned, is entitled to the same protection from the company while in the car as if in the regular waiting room; in either place the person is a passenger in the care of the company. *Shannon v. B. & A. R. R. Co.* 53.
2. For a passenger to jump upon or off of a moving train is *prima facie* negligence; if injured thereby, it is incumbent on him, in an action against the railroad, to prove a reasonable excuse for the act. *Ib.*
3. Whether a passenger had or not a reasonable excuse for jumping upon or off of a moving train is usually a question for the jury; an extreme case either way may be determined by the court. Fear of personal danger is not the only excuse that will exonerate one in jumping from a moving train. A passenger may in some cases be justified in alighting from a moving train merely to save himself from serious inconvenience; all depends upon the speed of the train and the attendant circumstances. *Ib.*
4. Three ladies, while waiting for the train to start in which they were to take passage, were invited by the station agent to sit in an empty car on a side track while the waiting room was being cleaned, he assuring them that the car would remain there; without signal or notice of any kind, the train to which the car was attached began to be moved out by an engine, without conductor or brakeman on board; startled by the sudden and unexpected movement, and alarmed lest they might be carried away from their intended destination, they hurried to the rear of the car and jumped out, while the train was still abreast of the platform and apparently moving slowly; one of them became injured by jumping; she obtained a verdict against the company; and the court determined that the verdict was not so far amiss on those facts as to require it to be set aside. *Ib.*
5. In assessing damages to be recovered by a railroad corporation against a town for its land taken by locating town ways across its track, the jury may take into consideration, in order to ascertain present value, not only the use which the railroad now makes of its located limits at the crossings, but what use it may reasonably be expected it will in the near future make of the same. *P. & R. R. Co. v. Deering*, 61.
6. It is not an unconstitutional exercise of legislative power to require a railroad corporation to build and maintain highway crossings laid out over its

- track, so far as such crossings are within its located limits, although the law imposing such burden was enacted since the railroad was built, the company being subject to the general laws of the state in existence when its charter was granted and such as should be thereafter passed. *Ib.*
7. Damages are not recoverable, by a railroad company against a town which has laid out ways over its track, for the interference and inconvenience occasioned to its business by the opening of the new ways, nor for any increased risks or increased expense in running its trains caused thereby. *Ib.*
8. It is admissible for witnesses, who have competent judgment and understand the elements of the question, to testify to their opinion of the damages sustained by a railroad corporation for having a highway located over its track. *Ib.*
9. The Knox and Lincoln Railroad Company is exempt from taxes other than specified in its charter. *State v. Knox & Lincoln R. R. Co. 92.*
10. The charter of a railroad company provided that a portion of its net income should be paid to the state as a tax and that "no other tax, than herein is provided, shall be levied or assessed on said corporation, or any of their privileges, property or franchises." *Held*, that the company was not liable to taxation under statute 1881, c. 91. *Ib.*
11. It is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is obstructed he must listen carefully; and to do this when riding with bells attached to his team, he must stop his horse. *Chase v. Maine Central R. R. Co. 346.*
12. Whether a railroad company is under an obligation to signal the approach of trains at a farm crossing, when used by the employees of an ice company in prosecuting its business, the court express no opinion. *Ib.*
13. A railroad corporation has practically the exclusive possession and control of the land within the lines of its location and the authority of removing therefrom all things growing thereon, the removal of which it may deem necessarily conducive to the safe management of its road. *Hayden v. Skillings, 413.*
14. A railroad company is not liable under R. S., c. 51, § 64, for damage to a pile of sleepers deposited near its track, caused by fire communicated from one of its locomotives. *Lowney v. New Brunswick R'y Co. 479.*
15. To enable the owner of the sleepers to maintain an action against the railroad company for such a damage, he must prove negligence on the part of the company, and that such negligence occasioned the fire and consequent damage. *Ib.*

REAL ACTION.

1. H conveyed to S a parcel of real estate the deed for which was not recorded. A third person, who had previously levied an execution upon the same real estate, without notice of the unrecorded deed, brought an action against H for the possession of the estate. After that action was entered in court, S recorded his deed. *Held*, that S could be regarded in no other light than as purchaser *pendente lite*. *Smith v. Hodsdon, 180.*

2. A purchaser of real estate *pendente lite* is chargeable with notice of the character of the suit, and of the extent of the claim asserted in the pleadings in reference to the title to such real estate, without express or implied notice in point of fact. *Ib.*
3. As such purchaser, he is bound by any judgment that may have been entered against the party from whom he has derived his alleged title, equally as if he had been a party to such judgment from the beginning. And the litigating parties are exempted from taking any notice of the title so acquired; nor are they obliged to make such purchaser a party to the suit. *Ib.*
4. If, pending a real action for the recovery of land, the title to the land, and the right of possession, pass from the plaintiff and become vested in the defendant, this fact may be pleaded in bar of the further maintenance of the suit. *Leavitt v. School District in Harpswell, 574.*

See PRACTICE, (LAW) 9.

REASONABLE USE.

See WATERS, 3.

RECEIVER.

See EQUITY, 7,

RECORD.

A record that recites a command in the writ for the officer to attach certain specified logs upon which a lien is claimed, and the return of the officer that he did attach the same and put his mark upon them, and that, within five days thereafter, he filed in the clerk's office of the town where the logs lay the usual copy of his attachment, is sufficient to sustain a judgment *in rem* against the logs. *Leviston Steam Mill Co. v. Merrill, 107.*

See JUDGMENT, 1. ERROR, 2, 4, 6. POOR DEBTOR'S DISCLOSURE, 2.

RECOUPMENT.

See PLEDGE, 5.

REFEREE.

1. When objections to the report of referees are based upon facts outside the record, the alleged facts must be proved to the court to sustain the objections to the report. Exceptions to the ruling of the court upon such objections must show that the alleged facts were proved. *Nutter v. Taylor, 425.*
2. An agreement as to the manner and place of hearing by referees, appointed by rule of court, is not binding, if it was not entered of record or embraced in the rule. When the parties do not agree upon the time and place of hearing the referees may determine the same. *Ib.*
3. Where the question before referees relates to real estate they may or not in

their discretion view the premises, and their determination, honestly made in regard to the necessity of a view, is final. *Ib.*

4. Regularly it is for the court and not the referees to fix the compensation of a surveyor, appointed by the court in the case. But where the referees allow the charges of the surveyor, that part of their report will not be rejected, when there is no suggestion that the charges thus allowed were unreasonably large in amount. *Ib.*

See ARBITRATION AND AWARD.

RENT.

See PAUPER, 10.

REPLEVIN.

1. Before a mortgagee of personal property, attached by an officer as the property of the mortgagor and placed in the hands of a servant of the officer for safe keeping, can maintain replevin therefor against such servant he must give the notice in writing required by R. S., c. 81, § 44. The servant may make the same defence that his master, the attaching officer, could make. *Potter v. McKenney*, 80.
2. One who procures a replevin writ to issue and causes it to be served, by which property is taken which belongs to a third person, is liable in trespass to the owner of the property; and the fact that he acted as the servant of the officer in making the service, would not protect him, even though the officer himself might have a valid defence. *Williams v. Bunker*, 373.

RESIDENCE.

See PAUPER, 6, 7, 8.

RES JUDICATA.

See WAYS, 21.

RETURN OF OFFICER.

See OFFICER'S RETURN.

REVIEW.

See LIMITATIONS, STATUTE OF.

SALES.

See AGENCY, 1, 4.

SCHOOL-MASTER.

1. A school-master is not liable for inflicting corporal punishment upon a pupil, if it is not clearly excessive, in the general judgment of reasonable men.

Patterson v. Nutter, 509.

2. It is error to instruct a jury that such punishment is lawful if it is not so clearly excessive "that all hands at once say it was excessive," or "that all hands would instinctively rise up and say 'that is excessive, that is beyond judgment.'"

Ib.

SECONDARY EVIDENCE.

See EVIDENCE, 5-7.

SET-OFF.

See PLEDGE, 3, 4.

SETTLEMENT.

See PAUPER, 1, 2.

SHADE TREE.

1. The owner of land upon a public way may lawfully plant ornamental or shade trees within the limits of the way, if the public use is not thereby obstructed or endangered. *Wellman v. Dickey*, 29.
2. Trees so planted are a public benefit, and can not be destroyed without the call of public necessity. *Ib.*
3. Highway surveyors, who destroy such trees without reason or necessity, are trespassers, and if the act is wanton, they are liable for exemplary damages. *Ib.*

SHERIFF.

See LIMITATIONS, STATUTE OF.

SHIPPING.

Where one owner of a vessel agrees to procure insurance for two or more other owners, and does procure insurance on their part with his in one policy, and collects on that policy for a loss, each of the other owners, whose portion of the vessel was covered by that policy, may maintain an action for his proportional part of the insurance money thus collected.

Gray v. Buck, 477.

SHORE.

The shore adjoining tide waters, not exceeding one hundred rods in width, belongs to the owner in fee of the uplands adjoining when bounded by such waters; but it may be severed by the owner, and he may sell either or both.

Abbott v. Treat, 121.

SLANDER.

See PLEADING, 4.

SPRING.

See WATERS, 6.

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STOCKHOLDER.

See CORPORATION, 3.

STOCK SUBSCRIPTION.

1. A subscriber to stock in a corporation, who never took any part in the organization of the corporation, can not be held upon his subscription, when it does not appear that the whole capital named in such subscription agreement, was subscribed.

Rockland Mt. Desert and Sullivan Steamboat Co. v. Sewall, 167.

2. The fact that a judgment creditor of a corporation took out execution and made seizure and sale thereon of the personal property of the corporation in

part satisfaction thereof, does not prejudice his case in an action to collect the balance of his judgment against a shareholder who has not paid for his stock.

Grindle v. Stone, 176.

3. In an action on a judgment debt of a corporation against Henry N. Stone of Boston, a shareholder therein, the certificate of organization was signed by Henry N. Stone of Boston. *Held*, that the defendant is the same person who signed the certificate of organization is *prima facie* shown by the identity of name, in the absence of any evidence of another person of that name in Boston. *Ib.*
4. In an action by a judgment creditor of a corporation against a stockholder who has not fully paid for his stock, the plaintiff must bring the case within the provisions of R. S., c. 46, §§ 46, 47, by showing: (1) That he has a lawful and *bona fide* judgment against the corporation "based upon a claim in tort or contract, or for any penalty" recovered within two years next prior to the commencement of this action; (2) that the defendant subscribed for or agreed to take stock in the corporation and has not paid for the same as payment is defined in § 45; (3) that the cause of action against the corporation accrued during the defendant's ownership of such unpaid stock; (4) that the proceedings to obtain the judgment against the corporation were commenced during the defendant's ownership of such unpaid stock, or within one year after its transfer was recorded on the corporation books. *Ib.*
5. The certificate of organization of a corporation showing that one shareholder took thirteen thousand three hundred and thirty-two and one-third shares of the capital stock of the par value of five dollars, that one hundred thousand shares issued in all and the amount paid in by the stockholders was one thousand dollars in money and ten thousand dollars in land, is *prima facie* proof that such shareholder had not paid in full for his stock, in the absence of any evidence to the contrary. *Ib.*

SUPREME JUDICIAL COURT.

1. The Supreme Judicial Court, as a court of equity, has supervisory rather than concurrent jurisdiction with the insolvent court; and it will not order an assignee to declare and pay a dividend until application has first been made to the insolvent court. *Bird v. Cleveland*, 524.
2. The Supreme Judicial Court has jurisdiction in an action of assumpsit, when the *ad damnum* is more than twenty dollars, though the cause of action set out in the declaration is a promissory note for twelve dollars. *Cole v. Hayes*, 539.

See EQUITY, 10.

SURETY.

See EQUITY, 8.

SURVEYOR.

See REFEREE, 4.

SURVEYOR OF HIGHWAYS.

See WAX. 205.

TAX.

1. The Knox and Lincoln Railroad Company is exempt from taxes other than specified in its charter. *State v. Knox and Lincoln R. R. Co.* 92.
2. The charter of a railroad company provided that a portion of its net income should be paid to the state as a tax and that "no other tax, than herein is provided, shall be levied or assessed on said corporation, or any of their privileges, property or franchises." *Held*, that the company was not liable to taxation under statute 1881, c. 91. *Ib.*
3. The Portsmouth bridge is a toll-bridge across the Piscataqua river from Kittery, Maine, to Portsmouth, N. H. *Held*, that so much of the bridge as is within the town of Kittery is there taxable as real estate. *Held further*, that the defendant is a corporation and owner of the bridge.
Kittery v. Prop's Portsmouth Bridge, 93.
4. An assessor of the city of Bath was elected and qualified in 1880 for three years. In 1883 he was re-elected, but it was denied that he was qualified. In 1884, he resigned and was re-elected for two years, to fill the vacancy, and was duly qualified. *Held*,
 1. That if he was not qualified under the 1883 election, he would hold over under his previous election, and that his acts as assessor during that year were valid.
 2. That his resignation and re-election in 1884 were legal.
Bath v. Reed, 276.
5. A tax was assessed against the "administrators of the estate of R," when the representative parties were executors and not administrators. *Held*, that this was not a fatal mistake, it being fairly within the scope of R. S., c. 6, § 142; and that parole evidence was admissible to show that the executors were the individuals intended to be taxed. *Ib.*
6. The same person was collector of taxes in a town for three years in succession, when there appeared a deficiency in his accounts. There was no evidence showing the time when the deficit commenced, or when it occurred, or of any appropriation of payments by him to the town, either by the collector or the town. He gave a bond each year. *Held*: That the deficit should be divided between the three bonds in the proportion of the sums collected by the collector on each commitment.

Phippsburg v. Dickinson, 457.

TELEGRAPH COMPANY.

See DAMAGES, 3.

THREAT.

See DURESS, 1, 2. EVIDENCE, 25.

TIMBER.

See PUBLIC LAND, 1.

TOWN AGENT.

1. A town agent can not maintain an action to recover compensation for his official services, unless the town has voted to pay him.
White v. Levant, 568.
2. The statutes of the state annex no compensation to the office of town agent.
Ib.

TRESPASS.

1. Those who authorize the commission of a trespass are equally responsible as those by whose acts the trespass is committed. *State v. Smith*, 260.
2. The assessors of a plantation were authorized by the land agent to guard certain lots, reserved for public uses, against trespassers. They had no right nor authority to permit or sell timber or other property from the lots. After exploring the lots, supposing they had such authority, they gave permits in writing to certain parties to take off the hemlock bark and timber from the lots. The permits were assigned to other parties who subsequently peeled the bark, and cut and carried away a portion of the timber, for which acts an action of trespass was brought against the assessors, and they were held liable. *Ib.*
3. One who procures a replevin writ to issue and causes it to be served, by which property is taken which belongs to a third person, is liable in trespass to the owner of the property; and the fact that he acted as the servant of the officer in making the service, would not protect him, even though the officer himself might have a valid defence. *Williams v. Bunker*, 373.

See BOND, 3. WAYS 5.

TRIAL JUSTICE.

See PRACTICE (LAW), 3.

SUPREME JUDICIAL COURT, 2.

TROVER.

1. An executor can be shown to be a nominal party by the probate records only in an action of trover by him to recover the value of certain personal property belonging to the estate. *Buck v. Rich*, 431.
2. An agreement acknowledging the possession of personal property claimed by another and promising to "keep said property free of expense" to the other, "and to deliver to him on demand such . . . as I admit to be" his property, and to keep the balance "until such time as the question of

title is settled," will not prevent such other person from maintaining trover for the same after demand and refusal. *Ib.*

3. A and H, each, owned a lot of logs of the same kind, quality and value, and bearing the same mark. H (and another party) contracted to saw A's logs at the same mill where his own were to be manufactured. The logs became intermixed without the fault of either party. *Held*: That A was entitled to his proportional part of the lumber manufactured from all the logs, and that if H converted to his own use more than his proportional part of the lumber, he would be liable in trover for the same without a special demand. *Martin v. Mason*, 452.

See MORTGAGE (CHATTEL), 2.

TRUSTEE.

In the investment of trust funds, trustees are to conduct themselves faithfully and in the exercise of a sound discretion, not with a view to speculation, but rather to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested. *Emery v. Bachelder*, 233.

TRUSTEE PROCESS.

The statutory rule that the prevailing party recovers cost, does not apply to a controversy between the plaintiff in a trustee action and a claimant of the fund trusted; costs in such a matter may be awarded as in equity; it is substantially an equitable proceeding. *White v. Kilgore*, 323.

See EXECUTOR AND ADMINISTRATOR, 2-5.

VOLUNTARY ASSOCIATION.

A voluntary association holding a fund of two thousand dollars, contributed by its members and divided into shares of twenty dollars each, for which certificates were issued, used the fund in repairing and furnishing a hall to be used as an Odd Fellows' Hall. *Held*, that equity would not, at the suit of the owners of three shares, compel the others to purchase those shares, or submit to have the furniture removed and sold and the proceeds divided, while the hall was being used as an Odd Fellows' Hall, though by a different lodge. *Robbins v. Waldo Lodge*, I. O. O. F. 565.

See EQUITY, 7. INSURANCE, (LIFE) 5.

WAIVER.

See APPEAL, 2. INSURANCE, (LIFE) 8.

WATERS.

1. The shore adjoining tide waters, not exceeding one hundred rods in width, belongs to the owner in fee of the uplands adjoining when bounded by such waters; but it may be severed by the owner, and he may sell either or both.
Abbott v. Treat, 121.
2. A right to the artificial flow of water through a water course, can be acquired by prescription.
Murchie v. Gates, 300.
3. Where one deliberately and without compulsion selects a particular portion of a floatable stream for the storage of logs, and thereby prevents another from entering such common highway with a drive of logs from a tributary stream, he is liable to such other person for the damages occasioned thereby.
McPheters v. Moose River Log Driving Co. 329.
4. Wages and board of men while waiting for a reasonable time would be an element of damage; so too, would the expense of moving one crew out and another in, as well as the increased cost, if any, of making the drive the next season, and the interest on the contract price for making the drive during such time as the payment thereof was delayed, because of inability to complete the drive on account of such obstruction. *Ib.*
5. The loss of supplies left in the woods for use when completing the drive, and destroyed by wild beasts, would not constitute an element of damage. *Ib.*
6. An easement originating from water supplied by a spring not situated upon land belonging to the grantor of the plaintiff's premises, will not pass as an appurtenance to the estate conveyed, unless it has become attached to the same.
Dority v. Dunning, 381.
7. But where such easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee. *Ib.*
8. There may be such an adverse and exclusive use of water flowing through an aqueduct, and for such a period of time, as may well be considered presumptive evidence of a grant. *Ib.*
9. Such right may thereby be acquired by prescription. *Ib.*
10. The right to draw water from a spring and to have pipes laid in the soil of another, and for that purpose to enter thereon, repair and renew the same, constitutes an interest in the realty, assignable, descendible and devisable. *Ib.*
11. Easements growing out of it may be acquired by grant or prescription, and thus become the objects of title in others. *Ib.*
12. An easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right. *Ib.*
13. But in order that the unity of title shall operate to extinguish an existing easement, the ownership of the two estates must be coextensive, equal in validity, quality, and all other circumstances of right. *Ib.*
14. If one is held in severalty and the other only as to a fractional part thereof by the same person, there will be no extinguishment of such easement. *Ib.*

15. The rule of damages in actions for the wrongful diversion of water stated. *Ib.*
16. The owner of a mill-dam on an unnavigable stream, who does not own the bed of the stream above the dam, has a qualified interest in the water flowed but none in the ice formed upon it. *Stevens v. Kelley, 445.*
17. The riparian owner is the owner of the ice in such case, though the ice privilege is made by the flowage. *Ib.*
18. Where the owner of such a mill-dam maliciously and unnecessarily draws the water from the pond and thus destroys the ice field, he is liable in damages to the riparian owner who owned the land under the pond. *Ib.*

See EMINENT DOMAIN, 2, 5.

WAY.

1. A deed containing the words "Excepting the roads laid out over said land," conveys the fee within the limits of the road, subject to the easement of the public incident to the uses of the way. *Wellman v. Dickey, 29.*
2. Highway surveyors may lawfully dig outside the limits of the road for materials suited for the making or repair of ways, only upon land that is unenclosed and uncultivated. *Ib.*
3. The owner of land upon a public way may lawfully plant ornamental or shade trees within the limits of the way, if the public use is not thereby obstructed or endangered. *Ib.*
4. Trees so planted are a public benefit, and can not be destroyed without the call of public necessity. *Ib.*
5. Highway surveyors, who destroy such trees without reason or necessity, are trespassers, and if the act is wanton, they are liable for exemplary damages. *Ib.*
6. In assessing damages to be recovered by a railroad corporation against a town for its land taken by locating town ways across its track, the jury may take into consideration, in order to ascertain present value, not only the use which the railroad now makes of its located limits at the crossings, but what use it may reasonably be expected it will in the near future make of the same. *Portland and Rochester R. R. Co. v. Deering, 61.*
7. It is not an unconstitutional exercise of legislative power to require a railroad corporation to build and maintain highway crossings laid out over its track, so far as such crossings are within its located limits, although the law imposing such burden was enacted since the railroad was built, the company being subject to the general laws of the state in existence when its charter was granted and such as should be thereafter passed. *Ib.*
8. Damages are not recoverable, by a railroad company against a town which has laid out ways over its track, for the interference and inconvenience occasioned to its business by the opening of the new ways, nor for any increased risks or increased expense in running its trains caused thereby. *Ib.*
9. It is admissible for witnesses, who have competent judgment and understand the elements of the question, to testify to their opinion of the damages

- sustained by a railroad corporation for having a highway located over its track. *Ib.*
10. No appeal lies to the county commissioners of York county, from the refusal of the city council of the city of Biddeford to locate and lay out a city street. *Biddeford v. Co. Com.* 105.
11. Where the city council have exclusive authority under the charter to lay out new streets and ways, the action of such council in refusing to lay out a way can not be reviewed or revised by the county commissioners under the provisions of R. S., c. 18, § 19. *Ib.*
12. County commissioners have no jurisdiction to lay out a highway under the provisions of R. S., c. 18, § 1, unless the petition therefor describes with reasonable definiteness the places where the proposed way is to commence and terminate. *Hayford v. Co. Com.* 153.
13. Where the petition prayed for a "county road leading from New Sweden to Fort Kent by the most direct and feasible route, commencing in New Sweden, at the terminus of the county road and running through townships 16 R. 3, 16 R. 4, 17 R. 4, 17 R. 5, 17 R. 6, Frenchville and Fort Kent, and passing between Cross Lake and Mud Lake," *Held*, that the described way was too indefinite and vague to give the commissioners jurisdiction. *Ib.*
14. The requirement of R. S., c. 18, § 5, that "if no notice of appeal is presented or pending" at the term of the county commissioners held next after the filing of their return, "the proceedings shall be closed," etc., are modified by § 48, to the extent that when a party has appealed from the decision on location after it has been placed on file and before the next term of the Supreme Judicial Court, "all further proceedings before the commissioners shall be stayed until the decision is made by the appellate court." *Boston & Maine R. R. Co. v. Co. Com.* 169.
15. The requirements of R. S., c. 18, § 5, relating to the time within which an appeal is to be taken by any person aggrieved at the estimate of damages by the county commissioners, are applicable only when no appeal on location has been taken. *Ib.*
16. When an appeal is taken from the decision of the county commissioners to lay out a way and prosecuted as provided in R. S., c. 18, §§ 48, 49, the appellant on damages may file notice of appeal within sixty days after final decision in favor of such way. *Ib.*
17. The phrase "within the time above limited" in R. S., c. 18, § 8, refers, when an appeal on location has been taken, to the time limited in § 47 of that chapter. *Ib.*
18. It is settled law in this state that, in an action against a town to recover damages for the death of a person alleged to have been caused by the negligence of the town in not keeping one of its ways in repair, the burden of proof is upon the plaintiff to show due care on the part of the deceased. *Merrill v. North Yarmouth*, 201.
19. A person undertook to drive with a horse and pung over a road, across which was flowing at the time a stream of water thirty or forty rods wide, and in some places not less than three feet deep, with a currant moving at the rate of five miles an hour, and carrying upon its surface cakes of ice,

some of which were twenty-five or thirty feet in diameter; at some stage of his journey, and in some way, he and his horse got out of the road and were precipitated into the deeper channel of the river below and drowned. *Held*, that one who knowingly and unnecessarily exposes himself to such perils can not be regarded as in the exercise of due care. *Ib.*

20. In an action against an individual for injuries sustained on account of defects or improper obstructions made by the defendant in a way, evidence is not admissible to prove that other persons passed safely over the alleged defect. *Branch v. Libbey*, 321.

21. The doctrine of *res judicata* does not apply to the action and judgment of county commissioners in locating highways. *Cole v. Co. Com.*, 532.

WILL.

1. A testator devised to his wife as follows: "All my real estate, together with any and all right, title and interest which I have in and to any and all real estate, or any and all which I may hereafter acquire, to remain hers so long as she shall remain unmarried after my decease. But if she shall marry again, then from that time she shall be entitled to, and receive only one-third part of all that remains. It is my desire and will that said real estate shall remain as it is for twenty years, giving all the income thereof to my said wife, but authorizing her, in case of necessity, to sell any part thereof for her support and maintenance during her widowhood" — with no devise over. The widow died without having married again. *Held*:

1. That the widow, by clear and apt words of the will, took a life-estate only.

2. That the contingent authority to sell for her support during widowhood, did not enlarge her estate to a fee, conferring only a power and not property.

3. That the expressed desire of the testator that the real estate "should remain for twenty years," etc., could not affect the alienation of the life-estate nor of the undevised reversion. *Nash v. Simpson*, 142.

2. When the complainant claims title under a will and files his bill under the statute for a construction of the will, and for an accounting and partition, the court, in the absence of any defect in his title, having thus acquired jurisdiction for the purpose of construing the will, has authority to do complete justice between the parties by compelling an account and partition. *Ib.*

3. A testator made a devise in these words: "The certain lot of land aforesaid set off to me from my son, Isaac Hilton, Junior, I devise, give and bequeath to him, the said Isaac, Junior, in trust for his heirs so long as he shall live and after his death, to his heirs, their heirs and assigns, to have and to hold forever." *Held*, that the effect of this devise under R. S., c. 73, § 6, was to vest a life-estate in Isaac Hilton, Junior, and a fee simple in his heirs.

Plummer v. Hilton, 226.

4. When the possibility of a failure of sufficient assets to meet the legacies named by a testator in his will has not been anticipated and specifically provided for by him, the presumption of intended equality prevails between

general legatees, as well as equality in respect to the share to be borne in all deficiencies of assets. *Emery v. Bachelder*, 233.

5. In the administration of testamentary assets where there is a deficiency of such assets after the payment of debts, expenses and specific legacies, the loss is to be borne *pro rata* by those pecuniary legacies which are in their nature general.
6. Annuities stand upon the same footing as legacies. *Ib.*
7. Between annuitants and legatees there is no priority merely because one is an annuitant and the other a legatee where the estate is deficient, but both must abate proportionally.
8. When a party is the devisee of the interest in real estate specifically devised as a life-estate, that fact will not preclude such party from taking the remaining interest in the estate in the character of a residuary devisee.

Davis v. Callihan, 313.

9. By one clause of a will the testator devised unto his wife, for and during the term of her natural life, certain real estate. The reversionary interest therein was not specifically devised. By the general residuary clause he devised unto his wife all the rest, residue and remainder of his estate, real, personal and mixed, wherever found and however situate. *Held*, that by the terms of the will and the intention of the testator as gathered from the whole instrument, the wife took an estate in fee in the real estate thus devised. *Ib.*

10. By the residuary clause of her will, a testatrix gave her son "all the residue and remainder of my estate, real, personal and mixed, wherever found and however situated." *Held*: That this passed to the son, a sum recovered from an Alabama claim by a claimant's administrator and distributed to the executor of such will. *Grant v. Bodwell*, 460.

See ANNUITY, 1, 2. APPEAL, 8. EXECUTOR AND ADMINISTRATOR, 3.

WINNEGANACE CREEK.

See FISHING, 1, 2.

WITNESS.

Where the defendant in a suit in equity is made a party as heir of the plaintiff's deceased wife, the plaintiff is thereby rendered incompetent as a witness by the provisions of R. S., c. 82, § 98. *Higgins v. Butler*, 520.

See LIMITATIONS, STATUTE OF.

WORDS.

1. "Debt or damages demanded." *Cole v. Hayes*, 539.
2. "Extreme cruelty." *Holyoke v. Holyoke*, 404.
3. "Lottery." *State v. Willis*, 71.
4. "Then and There." *Ib.*

WRIT OF ERROR.

See ERROR.

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